

Access Info Europe

Calle Cava de San Miguel 8, 4º centro
28005 Madrid, Spain



European Commission
Secretariat-General
Unit C.I. 'Transparency, Document Management and Access to Documents'
BERL 7/076
B-1049 Brussels

Madrid, 16 July 2019

Dear Secretariat General Transparency Unit

This is a confirmatory application sent by Helen Darbishire on behalf of Access Info Europe. The Confirmatory application is submitted as set out in Article 7(2) of Regulation (EC) No 1049/2001, to challenge the refusal by the Commission to provide access to documents with details on the mission expenses of the President of the European Commission Jean-Claude Juncker, with your references GESTDEM 2019/2752 (the request by our team member Jacob Finlay) and GESTDEM 2019/2780 (the request made by Helen Darbishire), as per the refusal decision dated 25 June 2019.

In your response you correctly summarise that the request sought documents relating to the mission of President Juncker to Buenos Aires from 28 November to 2 December 2018. Specifically, the two requests sought access to documents that contain a breakdown of the type or types of miscellaneous cost for which the spending of €8320 was incurred.

You have refused access to such documents by asserting that the “documents within the specific category of ‘miscellaneous costs’ contain personal data and can therefore not be disclosed as they are protected in their entirety under the exception for the protection of privacy and the integrity of the individual which is laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001.”

With this confirmatory application, Access Info respectfully requests that you reconsider this decision, taking into account the following:

- 1. Code of Conduct establishes the principle of transparency, and requires proactive publication, but does not limit further disclosure pursuant to requests**

In its response the Commission refers to the Code of Conduct for the Members of the European Commission, and notes “Commissioners have the obligation to “conduct missions in compliance with the rules in the Financial Regulation, the internal rules of the general budget of the European Union, the Guide to Missions and the rules set out in Annex 2.”

Access Info has previously welcomed the Code of Conduct and the proactive publication of mission costs that it mandates, out of recognition of the benefits of transparency. Proactive transparency is the most effective way of ensuring that the public can obtain information about the activities of public bodies and of public, and transparency therefore contributes to the Commission's treaty obligations to work as openly as possible. It does not, however, remove the possibility for additional documents to be requested and received.

Similarly, we welcome the confirmation that all spending is done in strict compliance with the rules. That said, the fact that there cadherence to the rules does not in any way remove the need for transparency. It should not be only in cases of suspected wrongdoing that there should be transparency, as open government has multiple other benefits, delivering an increased understanding of how the European Union works, improved participation, and higher levels of trust.

The Code of Conduct establishes that mission costs will be published unless a series of public interest reasons come into play; these reasons include public security, defence, international relations, and other exceptions to be found in Article 4.1.a) of Regulation 1049/2001.

Interestingly, the Code of Conduct does not make reference to Article 4.1.b) of the same regulation, which protects the *privacy and the integrity of the individual*. It might be assumed that this is because the proactive publication of the travel expenses of Europe's top officials was not considered to be something coming in the realm of data protection.

Indeed, the Code itself establishes the public interest in making public some very limited and specific personal data, namely the names of the Commissioners who travelled on public business and at the taxpayers' expense. Quite rightly, the Code does not require the publication of other personal data that might well cause damage to the Commissioners, such as, to imagine an example, the numbers of their personal bank accounts into which any reimbursements might be paid. Access Info has never sought and does not now seek access to that type of personal data.

Given that, at least since the adoption of the Code of Conduct, all the Commissioners are informed in advance of the fact that data on mission expenses associated with their names will be made public, they have, de facto at least, given their consent for the association to be made.

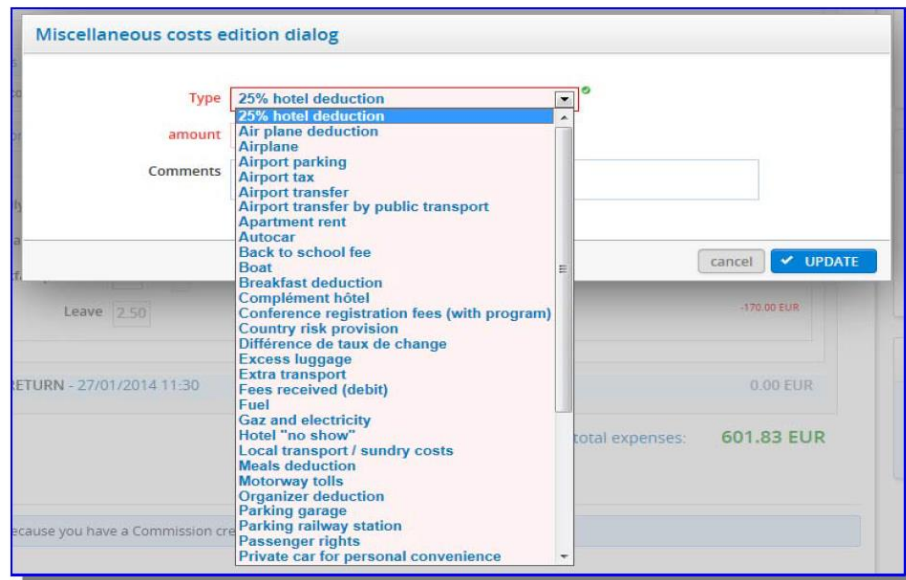
2. The Commission failed to identify the documents that fall under the scope of this request

In your response you do not specifically identify which documents the Commission has determined that it holds and that fall under the scope of this

request. This means that, in preparing this confirmatory application, we are somewhat in the dark as to how to structure some of the arguments. For example, we do not know if some of the information is held in databases from which it could be extracted, or whether it comes in the form of a travel claim, invoices, memos, emails or other material which would provide clarity as to on what the funds were spent.

We therefore ask you to provide more details in your response to this confirmatory and a list of the documents that you have identified that fall under the scope of this request.

In the meantime, we note that the Commissions' Guidance on inputting data into the Mission Processing System (MiPS) that was provided previously to Access Info¹ contains the following screenshot on entering miscellaneous costs:



I also note that in response to a follow-up request you informed us that “mission performers” are bound by the enter data in the MiPS system as set out in document C(2017)5323 final,² and that in the decision being challenged here you have confirmed that the guide to missions rules are followed by the Commissioners.

We therefore ask specifically that, in response to this confirmatory and in identifying the relevant documents, you confirm whether or not the MiPS contains the data that we are seeking, namely the relevant “type” of miscellaneous expense incurred.

¹ See the response to this request on AsktheEU.org

https://www.asktheeu.org/en/request/database_containing_commissioner#outgoing-6015

² See the response on AsktheEU.org here

https://www.asktheeu.org/en/request/mission_processing_system_mips#incoming-19736

3. Regulation 1049/2001 applies and the requested document does not, at least not in its entirety, contain personal data.

Irrespective of what is established in the Code of Conduct with respect to proactive publication, that Code in no way establishes a specific regime for access to documents, and with respect to this request, it is Regulation 1049/2001 that must be considered. The Code can neither limit nor be the basis for deciding on whether or not further information be released to the public.

Regulation 1049/2001 is the instrument that sets out the mechanisms for implementing the right of access to documents as protected, as of 1 December 2009, in Article 15 of the Treaty of the Functioning of the European Union and in Article 42 of the Charter of Fundamental Rights. These require that “Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.”

Hence any documents requested under these rules are to be considered to be, *prima facie*, accessible and in the public domain unless an exception applies.

It is indeed the case that Regulation 1049/2001 as currently framed defers to the Union’s rules on personal data protection when personal data is at issue, with Article 4.1.b) deferring to the data protection rules.

Nevertheless, we believe that the Commission erred in concluding that the requested document(s) contain personal data to the extent that they are protected in their entirety.

First, this is because the request only seeks a document that contains data on the type of miscellaneous expenditure incurred. It should be possible to provide that document – extracted from the MiPS system in an excel sheet or in another format – either with no personal data included and/or with the personal data (the name and surname of the any persons) redacted. We note that we have received excel sheets from other Commission agencies that appear to be extracted from a computer system and that do indeed itemise miscellaneous costs by type.

Second, Access Info did not seek information relating to an individual, but to an institution, in this instance, the institution of the President of the European Commission. The mere fact that the current holder of that office is Mr Jean-Claude Juncker is neither here nor there; what matters is that this is about the transparency and accountability of the institution.³

Supporting this argument is that document entitled “*ACCESS TO NAMES AND FUNCTIONS OF COMMISSION STAFF GUIDANCE NOTE*” with reference

³ In this sense Access Info’s request for the Commission President’s travel expenses is materially different from the matters at issue in the *Rechnungshof* and *Psara* cases that the Commission cites in its refusal decision.

Ares(2019)4352523, dated 8 July 2019, and provided to Access Info as a result of access to documents request GESTDEM 2019/3250. This document was developed with the aim “*to strike a fair balance between the right of access to documents and the right to personal data protection*” in order to determine whether the names of public officials should be provided or redacted in responses to access to documents requests. The document concludes that the names of Commissioners, their Cabinet Members, and staff in senior positions, namely Secretary-General, Directors-General, Directors, can be provided to the public unless very specific circumstances apply.⁴

For these people (in contrast to other officials), it is not necessary to require that requesters establish, either at the initial and at confirmatory stage, the need for and public interest in transmitting the personal data (the names). In other words, there is no need to apply the tests set out in Regulation 2018/1725.

The importance of the approach in this Guidance Note is that it seems, quite rightly, to consider that the persons holding these high level positions is in any event known and not relevant. Hence, while everyone knows that Jean-Claude Juncker is President of the European Commission, that is not relevant here, because what is relevant is how taxpayers’ funds were used in association with the public activities of the Commission President.

4. The Commission has failed to consider the specific public interest put forward in the request, namely the exercise of the right of access to documents

Without prejudice to the arguments set out in Point 3 above, Access Info here sets out why it believes that the Commission failed to properly and fully apply 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.

You put forward the argument that the data we requested – the name and surname of the President of the European Commission associated with data on how specific funds were spent – is personal data in its nature under Article 3(1) of Regulation (EU) 2018/1725.⁵ You then recall the *Rechnungshof* case, which established that “*there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life.*”⁶

⁴ This Guidance Note is in line with the type of guidance that can be found at the national level across Europe. For instance, the UK Information Commissioner has established that the seniority of the people involved lends itself to a higher level of accountability and responsibility. “Requests for personal data about public authority employees”

https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

⁵ This personal data, but at no point has the Commission asserted that it is “sensitive” data nor is it a “special category” of data as per the preamble of Regulation (EU) 2018/1725.

⁶ Judgment of the Court of Justice of 20 May 2003, C-465/00, C-13 8/01 and C-139/01, *Rechnungshof v Österreichischer Rundfunk and others*, EU:C:2003:294, paragraph 73.

And you support this line of thinking with reference to the *Psara* judgment, in which the General Court affirmed that no automatic priority can be conferred on the objective of transparency over the right to protection of personal data, and that “[t]he fact that data concerning the persons in question are closely linked to public data on those persons [...] does not mean at all that those data can no longer be characterised as personal data, within the meaning of Article 2(a) of Regulation No 45/2001.”⁷

Following its conclusion that all the requested documents fall under the scope of Article 4.1.b) of Regulation 1049/2001, the Commission then conducts an analysis using Regulation 2018/1725.

With respect to Article 5 Regulation 2018/1725, which establishes the principles relating to the lawfulness of processing, Access Info believes that it is clear that both the collection of the data at issue and its potential transfer is lawful in the sense that the data was collected to fulfil various tasks established by law. These include the financial management, control, and auditing of the expenses, and also the proactive publication of the expenses as required by the Code of Conduct with the aim of ensuring transparency and accountability to the European public.⁸ Responding to access to documents requests could well be determined to constitute either (a) performance of a task carried out in the public interest or in the exercise of official authority vested in the Union institution or body, or (b) processing is necessary for compliance with a legal obligation to which the controller is subject.

Another lawful basis for processing established in Article 5(1)(d) is that “the data subject has given consent to the processing of his or her personal data for one or more specific purposes.” It seems correct to sustain that the Commissioners are not only aware of the processing expenses data – given that they are surely aware of the Code of Conduct and the proactive publication of the travel expenses – but that they have given their consent in writing. Access Info is not informed as to whether the Commissioners, in their contracts, in other documents, or in agreeing to abide by the Code of Conduct, have to sign a document, but it is possible that in doing so they might have signed declarations related to the processing of their personal data. We note that this is increasingly common in employment contracts across Europe following entry into force on 25 May 2018 of the General Data Protection Regulation.

The Commission then considers Article 9 on Transmissions of personal data to recipients established in the Union other than Union institutions and bodies.

⁷ Judgment of 25 September 2018, *Maria Psara and Others v European Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraphs 91 and 52.

⁸ It is noted that, while the Code of Conduct refers to publication of an “overview” of the mission expenses, it does not specify what such an overview might contain. There is nothing to prevent the breakdown of miscellaneous costs by type being part of such an overview.

In its examination of Article 9(1)(b) of Regulation 2018/1725, the Commission concludes that Access Info did not convincingly assert, or indeed even omitted to put forward, arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

It is here that Access Info argues a failure to apply Regulation 2018/1725 correctly. It is clear from Paragraph 28 of the Preamble to Regulation 2018/1725 that “*The specific purpose in the public interest could relate to the transparency of Union institutions and bodies.*”

Therefore, a request for access to information, which would result in greater transparency of a Union institution – the Commission in this case – is in and of itself a specific purpose in the public interest.

Access Info made requests that clearly stated that they were presented in exercise of “the right of access to documents in the EU treaties.” As such we in no way failed to put forward one of the most relevant arguments possible: the public’s right of access to Union documents and the multiple benefits in the public interest that flow from transparency. The Commission, rather, has failed in its decision to consider this compelling and specific purpose for processing of personal data.

We believe that the new legal framework established by Regulation 2018/1725, means that the Commission should no longer rely heavily on previous case law, such as *Volker und Markus Schecke and Eifert, ClientEarth v EFSA* and *Psara* which established that mere invocation of the principle of transparency is not sufficient in and of itself to justify the disclosure of a document.

And even if, with the new legal framework, it might be possible to require requesters seeking some types of documents that contain personal data to demonstrate the specific purpose, we argue that this should not apply with respect to requests relating to the spending of public funds. The treaties, the case law of the Court of Justice of the European Union, and the decisions of the European Ombudsman clearly point to the principle of maximum possible transparency in the spending of public funds. This includes transparency about details of the use of public funds, which is what the request at issue is about. Hence these provisions establish a *prima facie* necessity to process and transfer this data.

This has been confirmed by the European Ombudsman in specific reference to the transparency of the Commissioners’ mission expenses, where she stated in her decision on cases 562/2017/THH and 1069/2017/THH that : “*the Ombudsman considers that there is a public interest in public access to information on Commissioners’ travel expenses.*”⁹

⁹ See Decision in cases 562/2017/THH and 1069/2017/THH on the Commission’s handling of a large number of requests for access to documents concerning Commissioners’ travel expenses <https://www.ombudsman.europa.eu/en/decision/en/106536>

Hence, when it comes to a request of the nature of the one at issue here, which seeks access to information about the spending of public funds, exercise of the right of access to documents should be considered as a specific purpose in the public interest. There should then be a consideration of the prejudice to legitimate interests. Wherever such prejudices cannot be identified, or where the public interest in transparency outweighs them, then the documents should be disclosed.

5. There is a strong and specific public interest in Access Info receiving the requested document(s).

In the event that would be held not to be sufficient to invoke the principle of transparency and the fundamental right of access to European Union documents in a case such as this, Access Info's request establishes an even more specific purpose, which we set out here.

Access Info's pursuance of transparency of travel expenses has the specific goal to ensure that there is public scrutiny of the spending of public funds, that there can be a fully-informed, evidence-based public debate about how such funds are used, and that the public can be confident that public bodies are exercising public power and spending public funds in a responsible and appropriate manner.

Even more specifically, our request is designed to permit us and others, including anti-corruption civil society organisations and investigative journalists, to act as public watchdogs. This is something that Access Info has pursued and has an acknowledged as having achieved over the course of the past five years of work on EU-level travel expenses, in addition to our wider track record during well over 13 years promoting transparency as a tool for defending human rights, fighting corruption, and promoting participation.¹⁰

Furthermore, when Access Info Europe makes requests such as this one via the AsktheEU.org website, the data becomes available to all members of the European (and indeed the global) public for them to exercise their rights to participation, to engage in public debate, and to hold public bodies accountable.

Such transparency is particularly in the public interest at the present time, in a political context of rising Euroscepticism and with it an ongoing debate about the role and functions of Commissioners, as well as more broadly about the salaries and expenses payments made by European taxpayers to public officials in Brussels. Basic information such as how the Commissioners spend funds, with details on how the funds are used, is essential to ensure an informed and accurate debate about the way in which Brussels functions. Access Info Europe aims with this request to contribute directly and specifically to that public debate, sharing, as we have done in the past, such information in order to broaden and deepen

¹⁰ Access Info Europe was established on 2 October 2006 as a human rights organisation, registered as an association with the Ministry of Interior in Spain, with the mission to promote transparency, in particular to defend other human rights, to permit public participation, and to promote accountability, and to support the fight against corruption.

understanding of the use of public funds in Brussels, and hence to provide greater legitimacy to the work of the European Commission.

As a civil society organisation, Access Info Europe plays a watchdog role akin to that of journalists in line with the European Court of Human Rights jurisprudence on access to information.¹¹ We therefore have a legitimate interest in obtaining information about the use of public funds – this request forms part of that line of enquiry – and we warrant similar protections as the press.¹²

The denial of this request would adversely affect our ability to exercise our role as a public watchdog, subsequently breaching not only the right of access to documents (Article 15 of the TFEU and Article 42 of the Charter of Fundamental Rights of the European Union) but also our right to freedom of expression and information in Article 11 of the Charter of Fundamental Rights of the EU, which is analogous to Article 10 of the European Convention on Human Rights.

The European Court of Human Rights has established, through a series of judgments, that the right of access to information is particularly strong for public watchdogs such as journalists and civil society human rights organisations.

Denying us this information is impeding us in carrying out this important watchdog function, something that the European Court of Human Rights has established is an interference with freedom of expression and information.

“As the applicant was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression”¹³

The Strasbourg Court has stated that public bodies cannot “allow arbitrary restrictions which may become a form of indirect censorship”.¹⁴ Given that the data that we are requesting warrants no special protection, and that there is a public interest to disclosure, in denying us access to this information, the Commission is creating barriers to the exercise of freedom of expression and information. The European Court of Human Rights has made clear that there is a positive obligation to eliminate such obstacles:

“The State’s obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues

¹¹ See, inter alia, the case of Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, ECHR, 14 April 2009

¹² Youth Initiative for Human Rights v. Serbia, App. No. 48135/06, ECHR, 25 June 2013, para 20

¹³ Youth Initiative for Human Rights v. Serbia, App. No. 48135/06, ECHR, 25 June 2013, para 24

¹⁴ Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, ECHR, 14 April 2009, para 27

*of public interest, such barriers exist solely because of an information monopoly held by the authorities”.*¹⁵

In conclusion, given that transparency is needed for us to carry out our watchdog activities, to contribute to public debate, and be able to make informed decisions on our elected representatives, there is a strong and specific purpose to transparency of the spending by public officials of public funds.

6. The Commission failed to establish that any data subject’s legitimate interests might be prejudiced

Once the public interest has been established, the Commission will be obliged to apply the balancing test ensuring that the principle of proportionality is taken into account, to determine whether release of the data would indeed prejudice legitimate interest.

There is nothing in the refusal decision to demonstrate that the Commission did indeed carry out such balancing. Nor is there any evidence in your decision that you have examined in detail the nature or scale of the harm that would be caused to the person whose private personal data you assert that you are protecting (President Juncker in this case).

The Court of Justice has ruled that the assessment of harm to a protected interest should be done so as to demonstrate how the protected interest would be actually and specifically undermined by release of the documents.

The Court of Justice has also established that, given the need for accountability and transparency of public authorities, there exists some expectation of disclosure of personal data among public officials:

*public figures have generally already accepted that some of their personal data will be disclosed to the public, and may even have encouraged or made such disclosure themselves. It is necessary therefore to take that environment into account when assessing the risk of the legitimate interests of public figures being prejudiced in the context of the application of Article 8(b) of Regulation No 45/2001, and in weighing those interests against the necessity of transferring the personal data requested.*¹⁶

The Court has furthermore made a distinction between the “public sphere” of a political or public person and his or her “private sphere”:

in weighing up the interests engaged, the legitimate interests of the MEPs who are members of the additional pension scheme, which fall into the public sphere of those MEPs, must be subject to a lesser degree of

¹⁵ Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, ECHR, 14 April 2009, para 36

¹⁶ Case T-115/13 Dennekamp v European Parliament (Dennekamp II) EU:T:2015:497, para 119

protection than that which, following the logic of Regulation No 45/2001, would be enjoyed by the interests falling into their private sphere.¹⁷

As previously noted, given the Code of Conduct and multiple other transparency initiatives by the Commission (such as publicity of information about meetings between senior officials and interest groups), the Commissioners will have a high expectation that their personal data (meaning in this case only their names, no more) will be made public associated with their public activities.

The Court has further made clear that even in the old regime of Regulation 45/2001, and without full balancing being given to the right of access to documents, it is not permissible to operate on a presumption in favour of protection of personal data:

While Regulation No 1049/2001 does indeed provide for an exception to the right of access to documents where disclosure would risk undermining the privacy or the integrity of the individual, thus making Regulation No 45/2001 applicable, that does not have the effect of creating a presumption in favour of the legitimate interests of persons whose personal data are protected by the latter regulation.

Furthermore, as argued in Point 3 above, the information being sought here is even less about the individual, and more about the institution of the President of the European Commission, which significantly minimises any potential that harm could be caused to an individual by revealing information of this nature, and is, we would argue, not sufficient to override the public interest in receiving this data.

7. The Commission failed to apply Article 9(3) of Regulation 2018/1725

Article 9(3) of Regulation 2018/1725 requires that “Union institutions and bodies shall reconcile the right to the protection of personal data with the right of access to documents in accordance with Union law.”

This is an important provision which goes somewhat to redressing the balance between the right of access to information and the right to personal data protection. It should be recalled that Regulation 1049/2001 on access to documents was adopted in 2001, some years before the Lisbon treaty came into force, and hence prior to the full recognition of a right of access to European Union documents, as set out in Article 15 of the Treaty on the Functioning of the European Union (TFEU) and Article 42 of the Charter of the Fundamental Rights of the European Union (the Charter).

Article 15 of the TFEU establishes a legally binding obligation on the Union bodies to conduct their work as “openly as possible” and be transparent in order to promote “good governance and ensure the participation of civil society”. This

¹⁷ Case T-115/13 Dennekamp v European Parliament (Dennekamp II) EU:T:2015:497, para 124

Article also establishes that European citizens and residents “shall have a right of access to documents of the Union's institutions, bodies, offices and agencies.”

Regulation 1049/2001, adopted as it was in 2001, defers to privacy and data protection which, at the time, were seen as stronger rights. Since 2001 all the international human rights bodies, including the European Court of Human Rights (from 2009 onwards), the UN Human Rights Committee (in 2011), the Inter-American Court of Human Rights (in 2006) as well as an increasing number of constitutions around European and globally, recognise the right of access to information as a fundamental right – not an absolute right, but a fundamental one.

The Commission should therefore have taken Article 9(3) of Regulation 2018/1725 into consideration, including when assessing the legitimacy of processing and the public interest in its consideration of Article 5 and 9(1)(b), as we set out above. We now respectfully urge the Commission to give due consideration to Article 9(3).

In conclusion, Access Info Europe calls on the Commission thoroughly to review the refusal to provide the requested documents, full and adequately taking the above arguments and reasoning into account.

Please do not hesitate to contact me should you require any clarifications on this confirmatory application.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Helen', with a long, sweeping horizontal line extending to the right.

Helen Darbshire

Access Info Europe