EUROPEAN COMMISSION

Brussels, 19.11.2018
C(2018) 7761 final

Belgium

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

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/4747

Dear [Name],

I refer to your email of 8 October 2018, registered on the next day, in which you lodge a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR APPLICATION

In your initial application of 10 September 2018, addressed to the Directorate-General for Environment and registered under reference number GESTDEM 2018/4747, you requested access to ‘all official letters sent by EU ministers to the European Commission in the past five years on the subject of ship recycling’.

In its initial reply dated 8 October 2018, the Directorate-General for Environment informed you that it had identified six documents as falling within the scope of your request. It granted

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2 Official Journal L 145, 31.05.2001, p. 43.
full access to five of these documents (i.e. documents 1, 2, 4, 5 and 6 containing letters from ministers and state secretaries of Belgium, Denmark and the Hellenic Republic). Moreover, it granted full access to four replies of Commissioner Vella in this context.

Taking into account the opinion of the authorities of the Republic of Cyprus, which had been consulted pursuant to Article 4(4) and (5) of Regulation 1049/2001, the Directorate-General for Environment refused access to document 3. The latter consists of a letter signed by Nicos Kouyialis, Minister for Agriculture, Rural Development and Environment of the Republic of Cyprus to Commissioner Karmenu Vella of 19 August 2015 concerning Regulation 1257/2013.

This refusal is based on Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation 1049/2001.

In your confirmatory application, you request a review of this position and access to the relevant document.

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.

In accordance with Article 4(4) of Regulation 1049/2001, ‘as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed’. According to Article 4(5) of Regulation 1049/2001, ‘a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement’.

Under the provisions of Article 4(4) and (5) of Regulation 1049/2001, a renewed consultation of the authorities of the Republic of Cyprus was initiated by the Secretariat-General. The authorities of the Republic of Cyprus did not oppose disclosure of the requested document at the confirmatory stage.

Taking account of the opinion of the authorities of the Republic of Cyprus, which the Secretariat-General has sought in the framework of its confirmatory review, I can inform you that partial access is granted to document 3, subject to the redaction of personal data on the basis of the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) and pursuant to Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation 1049/2001.

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3 Numbered as documents 1.1, 2.1, 4.1 and 5.1 at confirmatory level.
Please note that, due to an administrative error, personal data including handwritten signatures contained in the other documents were disclosed at the initial stage.

The European Commission did not intend to make public this data, which must also be protected in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. This error is corrected in the versions of the documents that are again enclosed to this decision.

I therefore ask you to disregard the documents in the versions that were provided to you at the initial level.

### 2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 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’.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001 (hereafter ‘Data Protection Regulation’) becomes fully applicable.\(^5\)

Article 2(a) of the Data Protection Regulation\(^6\) provides that personal data ‘shall mean any information relating to an identified or identifiable 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’. According to the Court of Justice, there is no reason of principle to justify excluding activities of a professional nature from the notion of private life.\(^7\)

Document 3, which falls under the scope of your confirmatory application, as well as the documents disclosed at initial level, contain personal data such as the names and functions of individuals who were not main representatives of the respective EU Member States at the moment the letters concerned were written, as well as email addresses and phone numbers that are not in the public domain.

Moreover, document 3 contains two handwritten signatures (i.e. the cover page and the letter itself) and a handwritten salutation (i.e. ‘Dear friend Karmenu’ in the letter).

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\(^7\) Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.
Finally, the documents disclosed at initial level also contain handwritten signatures\(^8\).

The names\(^9\) 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 the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. 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.\(^10\) Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the transfer of personal data occur.

In its judgment in the ClientEarth case, the Court of Justice ruled that 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.

If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access.\(^11\)

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.\(^12\)

In your confirmatory request, you do not establish the necessity of having the data in question transferred to you.

Furthermore, there are reasons to assume that the legitimate interests of the individuals concerned would be prejudiced by disclosure of the personal data reflected in the documents concerned, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

As to the handwritten signatures appearing in all the documents and the handwritten salutation contained in document 3, which constitute biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data that have been redacted from document 3 falling under

\(^8\) On the need to protect signatures as an element of personal data: judgment of 19 September 2018, Port autonome de Brest v Commission, T-39/17, T:2018:560, paragraph 43.


\(^10\) Idem, paragraphs 77-78.


the scope of your confirmatory application as well as from the documents disclosed at initial level, as the need to obtain access thereto 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.

2.2. Protection of the public interest as regards international relations

Article 4(1)(a), third indent of Regulation 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] the public interest as regards […] international relations’.

The General Court has acknowledged that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, […] the Courts review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’.

Moreover, the General Court recently ruled that, as regards the interests protected by Article 4(1)(a) of Regulation No 1049/2001, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation’.

Document 3 has been examined in light of the above-mentioned case law. The part redacted on page 2 of the letter of the minister of the Republic of Cyprus refers to informal discussions between the European Commission and the responsible Turkish authorities on how Regulation 1257/2013 would apply to Turkish facilities. The issues at stake are still relevant in view of the upcoming adoption of the fourth list of European ship recycling facilities, which is expected to include for the first time Turkish yards. This is also a sensitive issue against the background of ongoing accession negotiations between Turkey and the EU. Disclosure of the content of these informal discussions would therefore undermine the climate of mutual trust that is necessary for the ongoing accession negotiations in general and the proper implementation of Regulation 1257/2013 in particular.

Consequently, I conclude that the redacted part of document 3 is protected against public disclosure, pursuant to the exception provided for in Article 4(1)(a), third indent of Regulation 1049/2001.

3. **PARTIAL ACCESS**

As indicated above, partial access is herewith granted to document 3 falling under the scope of your confirmatory application pursuant to Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(1)(a), third indent (protection the public interest as regards international relations) as well as wide partial access to the documents disclosed at initial level, subject to the redaction of personal data only on the basis of Article 4(1)(b) of Regulation 1049/2001.

4. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note that Article 4(1)(b) and Article 4(1)(a), third indent of Regulation 1049/2001 are absolute exceptions, which do not require the institution to balance them against a possible public interest in disclosure.

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

Yours sincerely,

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*For the European Commission*

*Martin SELMAYR*

*Secretary-General*

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**CERTIFIED COPY**

For the Secretary-General,

*Jordi AYET PUIGARNAU*

Director of the Registry

EUROPEAN COMMISSION

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Enclosures (10: 1 document falling under the scope of your confirmatory application and corrected versions of the 9 documents disclosed at initial level)