



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
HUMAN RESOURCES AND SECURITY
The Director-General

Brussels, 12 November 2020
HR/GI

Ms Margarida da Silva
CEO
Rue d'Edimbourg 26
1050 Brussels
By email: ask+request-8376-7bde090b@asktheeu.org

Subject: Your application for access to documents – Ref /GestDem No 2020/5818

Dear Ms DA SILVA,

I refer to your e-mail, dated 1 October 2020 and registered on 2 October 2020 under reference number 2020/5818, in which you make a request for access to documents.

As you indicated in your e-mail, this request is a follow-up to your previous request, under reference number 2020/4817, that was answered by my services on 24 September 2020. In that answer you were provided with, firstly, the relevant parts falling under the scope of your request of 10 documents relating to the ethical obligations of outgoing and incoming cabinet members in the context of the 2019 transition between the “Juncker Commission” (2014-2019) and the “Von der Leyen Commission” (2019 - 2024); secondly, with the latest version of the Practical Guide to Staff Ethics and Conduct; and, finally, with statistics regarding the requests submitted in 2019 under the Staff Regulations (SR) Article 16 (“occupational activities after leaving the service”) and Article 12b of the Staff Regulations in relation with Article 40 (“outside activities while on unpaid leave on personal ground”), with particular interest in the number of requests rejected.

Your current request 2020/5818 relates to “[...]documents which contain the following information:

- *The reasoning or justification for the 3 unfavourable decisions taken in 2019 relating to the implementation of Article 16 of the Staff Regulations*
- *The reasoning or justification for the 3 unfavourable decisions taken in 2019 relating to the implementation of Article 12b in combination with 40 of the Staff Regulations*

Please note that I am not interested in personal data - feel free to redact that information. I am merely interested in knowing why those requests were not authorised.”

I have examined your request under the provisions of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

I understand that your request refers to documents relating to the decisions taken in 2019 rejecting requests for occupational activities after leaving the service (Article 16 SR) and outside activities while on unpaid leave on personal ground (Article 12b SR in relation with Article 40 SR).

In this context, the documents identified in the framework of your request are six decisions by the competent Appointing Authority, regarding three requests for occupational activities after leaving the service and three requests for outside activities while on unpaid leave on personal ground. Please note that the three decisions regarding requests falling under Article 12b SR on outside activities are also linked to another three decisions taken to assess the requests for leave on personal ground as per Article 40 SR. In addition, e-mail exchanges within Commission services and between Commission services and the staff members concerned regarding the requests for authorisation lodged under Article 16 SR have been identified.

In accordance with Article 4(1) (b) of Regulation (EC) 1049/2001, it is the Commission's obligation to ensure that the privacy and the integrity of the EU staff members concerned (the requestors of the requests covered in this request), including their professional capacity, are correctly protected. The documents you requested contain personal data relating to the past and present occupational activities of the staff members concerned, the disclosure of which would entail a transmission of personal data falling under the provisions of Regulation (EU) 2018/1725¹.

In the case *EC v Bavarian Lager*², the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EU) 2018/1725 becomes fully applicable³. Pursuant to Article 9(1)(b) of that Regulation, personal data shall only be transferred to recipients if they established the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

In your request you did not establish the necessity of having the data transferred and I consider that the legitimate interests of the individuals concerned would be prejudiced by the disclosure of their personal data. Consequently, I consider that the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 applies to all the identified documents.

As for the correspondence within Commission services and between the Commission services and the staff members submitting the requests, in addition to the protection of personal data, the second subparagraph of Article 4(3) of Regulation (EC) 1049/2001

¹ Regulation (EU) No 2018/1725 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 (OJ L 295, 21.11.2018, p. 39).

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

³ This judgment specifically cited Regulation (EC) No 45/2001, which was repealed by Regulation (EU) 2018/1725. In accordance with Article 99 of that latter Regulation, references to Regulation (EC) No 45/2001 should be construed as references to Regulation (EU) 2018/1725.

applies. That exception is related to the protection of the Commission's decision-making process even after the decision of the Appointing Authority has been taken. As no overriding public interest in disclosure has been identified in the present case, that exception to the right of access cannot be waived.

While I have also considered the possibility of granting partial access on the basis of Article 4(6) of Regulation (EC) No 1049/2001, I have concluded that this would equally undermine the protection of personal data and of the decision making process.

Against this background, in order to address your query to the extent possible, I can nevertheless provide you with the following general information on the six decisions to which your request relates.

Regarding the three rejected requests for occupational activities after leaving the service, for all three requests a potential or perceived conflict of interest was identified in relation to the work carried out in the last three years of service, in the meaning of the second paragraph of Article 16 SR, that could not be mitigated with less restrictive measures.

In the context of the requests for authorization to conduct an outside activity (Article 12b SR) while being on unpaid leave on personal ground (Article 40 SR), I would like to inform you that the Commission has two autonomous but interlinked procedures to assess and provide a decision on the requests of its staff members. A staff member has to submit a request for unpaid leave on personal ground based on Article 40 SR to obtain a decision from the Appointing Authority on this request. At the same time, to be granted authorization to conduct an outside activity, during a period of unpaid leave on personal ground, the staff has to submit a different request as per Article 12b SR.

Pursuant to Article 1 of the Commission Decision on measures concerning leave on personal grounds for officials and unpaid leave for temporary and contract staff of the European Union C(2013) 9054 final, the Appointing Authority takes a decision on granting that leave after consulting the applicant's immediate superiors, having examined the request in detail and taken into account all relevant factors, in particular the reason for the leave, its duration and the immediate needs of the service.

In accordance with Article 15(2) of the Commission Decision on outside activities and assignments and on occupational activities after leaving the Service C(2018) 4048 final, staff members shall not be granted permission to engage in occupational activities or assignments (paid or unpaid) which involve lobbying or advocacy towards the institution and which could lead to a conflict of interest, or the possibility of such a conflict, with the legitimate interests of the institution.

Pursuant to Article 15(3) of the Commission Decision on outside activities and assignments and on occupational activities after leaving the Service C(2018) 4048 final, for outside activities while on leave on personal grounds permission shall, in principle, be granted except where the outside activity or assignment could give rise to a conflict of interest or be incompatible with the interests of the institution. If a potential conflict of interest is identified or a detrimental effect on the interests of the institution is shown, the Appointing Authority may authorise the activity in question while imposing appropriate restrictions or not grant such an authorization.

In these cases, it is common that the outcome of the request for outside activity is dependent on the decision whether to grant, or not, the period of leave on personal ground, and vice versa. This is commonly the case, when the outside activity requires

full-time dedication, therefore requiring that the staff member stops working for the Commission and is granted a period of leave on personal ground.

Against this background, I can inform you that the 2019 negative decisions on requests for outside activities while on leave on personal ground falling under the scope of your request were adopted by the competent Appointing Authority because the requests were not meeting the required conditions for them to be accepted, after being assessed in the light of the aforementioned legal frameworks.

In this context, I would like to underline the fact that an outside activity during leave on personal ground, or an occupational activity after leaving the service, is not prohibited does not mean that it is authorised without strict conditions if a conflict of interest is identified (even a potential or perceived one) to prevent any undue influence. These restrictions can be very strict, such as a ban on professional contacts with former Commission staff or the prohibition to work on specific files to avoid any conflict of interest. As the assessment is made on a case-by-case basis, prohibitions or restrictions must be well reasoned and proportionate. Prohibitions are imposed only in cases where adequate mitigating measures cannot be put in place to alleviate the risk of conflict of interest, in line with the principle of proportionality. When staff members face the risk of a prohibition, they often withdraw their request or do not submit it formally after receiving guidance from the ethics service.

I would like to remind you that Corporate Observatory Europe remains subject to the provisions of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation⁴) according to which personal data must, *inter alia*, be processed fairly and lawfully and subject to the unambiguous consent of the data subject concerned.

In accordance with Article 7(2) of Regulation (EC) 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission, Secretary-General

Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076

B-1049 Brussels

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

(e-signed)

Gertrud INGESTAD

⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.