



EUROPEAN COMMISSION

LEGAL SERVICE
The Director-General

Brussels, 10 December 2020

By email

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Subject: Request for access to documents

Ref.: Your request of 22 October 2020, registered on 28 October 2020, under reference: GestDem 2020/6376

Dear Dr McIntyre,

I refer to your above-referenced request, under Regulation (EC) No 1049/2001 regarding public access to documents¹, concerning “*all written submissions made to the Court in Case C-623/17 and Joined Cases C-511/18, C-512/18 and C-520/18.*”

In accordance with the *fair solution proposal*² agreed upon by email of 28 October 2020, the Legal Service has registered your request to the written submissions made:

- by all the parties in Case C-623/17, *Privacy International*³;
- by Ireland in Joined Cases C-511/18, *La Quadrature du Net* and C-512/18 *French Data Network* and in Case C-520/18, *Ordre des barreaux francophones et germanophone*⁴.

Please be informed that Cases C-511/18 and C-512/18 were joined for the purpose of the written and the oral procedures and for the judgment. Case C-520/18 was joined to Cases C-511/18 and C-512/18 for the purpose of the judgment only.

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.05.2001, page 43).

² Reference Ares(2020)6031914.

³ Judgment of the Court of Justice of 6 October 2020, Case C-623/17, *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others*, ECLI:EU:C:2020:790.

⁴ Judgment of the Court of Justice of 6 October 2020, Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v Premier ministre and Others*, ECLI:EU:C:2020:791.

1. IDENTIFICATION OF THE DOCUMENTS

The written observations of the following parties have been identified as matching the terms of your request:

Case C-623/17

1. European Commission;
2. Belgian Government;
3. Cypriot Government;
4. Czech Government;
5. Estonian Government;
6. French Government;
7. German Government;
8. Hungarian Government;
9. Irish Government;
10. Latvian Government;
11. Norwegian Government;
12. Polish Government;
13. Portuguese Government;
14. Spanish Government;
15. Swedish Government;
16. The Netherlands Government;
17. xxxxxxxxxxxxxxxx Government;

Joined Cases C-511/18 and C-512/18

18. Irish Government;

Case C-520/18

19. Irish Government.

2. WRITTEN OBSERVATIONS SUBMITTED BY THE EUROPEAN COMMISSION (DOCUMENT 1)

The Commission's written observations in Case C-623/17 have been disclosed by the Legal Service following a previous request for access under Regulation (EC) No 1049/2001. They are publicly available on the Legal Service's website following the link:

https://ec.europa.eu/dgs/legal_service/submissions_cour_en.htm

Although not concerned by the request, I would like to inform you that the Commission's written observations in Joined Cases C-511/18 and C-512/18 and in Case C-520/18 are also available on the Legal Service's web mentioned above.

You may reuse those documents free of charge provided that the source is acknowledged and that you do not distort their original meaning or message. Please note that the Commission does not assume liability stemming from the reuse.

3. WRITTEN OBSERVATIONS SUBMITTED BY THE OTHER PARTIES (DOCUMENTS 2 TO 19)

As far as the written observations of the other parties are concerned, the Commission has consulted the authors of the respective documents on their disclosure, in accordance with Article 4(4) of Regulation (EC) No 1049/2001.

Following these consultations, I would like to inform you that:

- the Governments of Belgium, the Czech Republic, Estonia, Germany, Latvia, Poland, Portugal, Sweden, The Netherlands and the United Kingdom (documents 2, 4, 5, 7, 10, 12, 13, 15, 16 and 17) have agreed to the disclosure of their written observations.

Please note however that some personal data mentioned in document 17 has been redacted, as will be explained in point 3.1.1 below;

- the Governments of Cyprus, France, Hungary, Ireland and Spain (documents 3, 6, 8, 9, 14, 18 and 19) have informed the Commission that they refuse access to their written observations, considering that they are covered by the exception provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001 (“*protection of court proceedings*”), as explained in point 3.2 below.
- the Government of Norway (document 11) has not replied to the Commission's consultation.

3.1. Disclosure of the written observations submitted by the Governments of Belgium, the Czech Republic, Estonia, Germany, Latvia, Norway, Poland, Portugal, Sweden, The Netherlands and the United Kingdom

As stated above, the Governments of Belgium, the Czech Republic, Estonia, Germany, Latvia, Poland, Portugal, Sweden, The Netherlands and the United Kingdom (documents 2, 4, 5, 7, 10, 12, 13, 15, 16 and 17) have agreed to the disclosure of their written observations.

Regarding the Norwegian submission for which the Commission has not received a reply (document 11), I would like to inform you that access can be granted in accordance with Regulation (EC) No 1049/2001.

In fact, the Court of Justice has recognised in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P that, in cases where the proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine those proceedings⁵.

Since Case C-623/17 is now closed, and in the absence of an objection from the Norwegian authorities, I conclude that access can be granted to the relevant document in accordance with Regulation (EC) No 1049/2001, with the exception of some personal data, as will be explained below in point 3.1.1.

Accordingly, please find attached the redacted original versions of documents 11 and 17 in English, as well as the English translation of documents 2, 4, 5, 7, 10, 12, 13, 15 and 16, made by the services of the Court of Justice⁶.

The disclosed documents were transmitted by the Court of Justice to the Commission in its capacity as participant in the court proceedings. Access to them is granted for information only and they cannot be re-used without the agreement of the originators, who hold the copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

⁵ Judgment of the Court of Justice of 21 September 2010, Joined Cases C-514/07P, C-528/07P and to C-532/07P, *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541, paragraphs 130 and 131.

⁶ The original documents being in French, Dutch, Czech, Estonian, German, Latvian, Polish, Portuguese and Swedish, respectively.

3.1.1. Refusal of personal data

As mentioned above, some personal data has been redacted in documents 11 and 17 since covered by the exception provided for in Article 4 (l)(b) of Regulation (EC) No 1049/2001 ("*protection of personal data*")⁷, in accordance with the European Union legislation regarding the protection of personal data. This information is the following:

- the phone numbers and handwritten signatures of the agents representing the Norwegian Government (first and last page of document 11);
- the name and handwritten signature of the Court's official (first page of document 11);
- the handwritten signature of the agent representing the Government of United Kingdom (last page of document 17).

The applicable legislation in this field is 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁸ ('Regulation (EU) 2018/1725').

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data '*means any information relating to an identified or identifiable natural person [...]'*'. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁹

In its judgment in Case C-28/08P (*Bavarian Lager*)¹⁰, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹¹. Furthermore, in its judgment in Joined Cases C-465/00, C-138/01 and C-139/01 the Court has recognized that "*there is no reason of principle to justify excluding activities of a professional nature [...] from the notion of private life*"¹².

On this basis, the phone numbers of the agents representing the Norwegian Government and the handwritten signatures of both the Norwegian and United Kingdom agents have been deleted in documents 11 and 17 since they constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

⁷ "The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data".

⁸ OJ L 205 of 21.11.2018, page 39.

⁹ Judgment of the Court of Justice of 20 December 2017, Case C-434/16, *Peter Nowak v Data Protection Commissioner*, ECLI:EU:C:2017:994, paragraphs 33-35.

¹⁰ Judgment of the Court of Justice of 29 June 2010, Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, ECLI:EU:C:2010:378, paragraph 59.

¹¹ *Bavarian Lager* judgment, paragraph 63. Whereas this judgment specifically related to 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 data, the principles set out therein are also applicable under the new data protection regime established by Regulation (EU) 2018/1725.

¹² Judgment of the Court of Justice of 20 May 2003, Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof and Others v Österreichischer Rundfunk*, ECLI:EU:C:2003:294, paragraph 73.

As regards the personal data of the officials of the institutions, the General Court has confirmed in its judgment in Case T-39/17 that the information such as names, signatures, functions, telephone numbers and other information pertaining to staff members of an institution fall within the notion of "*private life*", regardless of whether this data is registered in the context of a professional activity or not. Therefore, the name and handwritten signature of the Court's official has been deleted in document 11, since this information also constitutes personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725¹³.

Pursuant to Article 9(1)(b) of Regulation (EU) 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 met and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation (EU) 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 has established 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.

In your request, 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.

Notwithstanding the above, please note that 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 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.

¹³ Judgment of the General Court of 19 September 2018, Case T-39/17, *Chambre de commerce and d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

3.2. Refusal of the written observations submitted by the Governments of Cyprus, France, Hungary, Ireland and Spain

As indicated above, the Governments of Cyprus, France, Hungary, Ireland and Spain (documents 3, 6, 8, 9, 14, 18 and 19) informed the Commission that they oppose disclosure of their written observations for considering that they are covered by the exception provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001 ("*protection of court proceedings*")¹⁴.

The purpose of the exception for the protection of court proceedings is to maintain the independence of the European Union's institutions in their dealing with the courts, to protect the integrity of court proceedings and to ensure the proper course of justice.

In this sense, the Court of Justice has recognised in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P, that disclosure of pleadings lodged before the Court of Justice in pending court proceedings is presumed to undermine the protection of these proceedings¹⁵.

The Court has furthermore stated that with the closure of the proceedings there are no longer grounds to presume that disclosure of the pleadings would undermine the judicial activities of the Court. However, the Court has admitted the possibility that disclosure of pleadings relating to court proceedings, which are closed but connected to other proceedings which remain pending, may create a risk that the later proceedings might be undermined¹⁶.

In response to the Commission's consultation, the Cypriot authorities argue that their written observations in Case C-623/17 are intrinsically linked to the written submissions that the Republic of Cyprus has submitted in Case C-140/20¹⁷, a request for a preliminary ruling which is presently pending before the Court of Justice. Those cases form part of a series of preliminary references from various national courts, concerning the compatibility of national data retention legislation with EU law in light of the Court of Justice judgment in Joined Cases C-203/15 and C-698/15¹⁸. Consequently, they consider that disclosure of their written observations would undermine the pending court proceedings.

The French authorities invoke the fact that the main proceedings are still pending before the British courts. Moreover, they argue that Case C-623/17 is linked to Case C-511/18¹⁹, which must also be regarded as still pending since the *Conseil d'Etat* (France) has not yet rendered its decision. In the light of this, they consider that their pleading in Case C-623/17 cannot be disclosed.

For their part, the Hungarian authorities invoke that disclosing their written observations would negatively affect several similar ongoing court proceedings in which Hungary did not lodge written observations but, according to the rules of procedure of the European Court of Justice, it has still the possibility to participate in the hearing to present its legal position. Under those circumstances, disclosure of the written observations in Case C-623/17 may

¹⁴ "[T]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings [...] unless there is an overriding public interest in disclosure".

¹⁵ *Op. cit.*, paragraph 94.

¹⁶ *Ibid.*, paragraphs 130, 131 and 132.

¹⁷ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-140/20>

¹⁸ Judgment of the Court of Justice of 21 December 2016, Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, ECLI:EU:C:2016:970.

¹⁹ See footnote 4.

result in an undue interference on the pending court proceedings and can negatively influence their outcome. In fact, they consider that, on the one part, it could have a detrimental effect on the reasoning of the parties having a similar legal position as Hungary had in the abovementioned case. On the other part, their opponents having access to the submission requested may be able to exploit to their advantage the legal reasoning it contains.

The Irish authorities indicate that they could only consent to the release of their submissions in Case C-623/17, in Joined Cases C-511/18, C-512/18 and in Case C-520/18 subject to the associated domestic proceedings being concluded. In the meantime, the three documents requested must to be refused in their entirety in accordance with the second indent of Article 4(2) of Regulation 1049/2001.

With regard to the written observations in Joined Cases C-511/18 and C-512/18 and in Case C-520/18, the Irish authorities argue that those pleadings made extensive reference to an Irish case, *Graham Dwyer v. Commissioner of An Garda Síochána & Others*, where domestic proceedings remain extant before the Irish Supreme Court and where a preliminary reference remains pending before the Court of Justice in Case C-140/20. Accordingly, Ireland objects to their disclosure.

Finally, the Spanish authorities argue that judicial proceedings where similar issues arise are still pending before the Court of Justice, namely Joined Cases C-793/19 and C-794/19²⁰ and Case C-140/20. They consider that disclosure of their written observations in Case C-623/17 would be detrimental to the parties' right of defence as well as to the proper course of the legal proceedings mentioned without being subject to external interferences.

Consequently, the third parties consider that, for as long as those proceedings are pending, their written observations are entirely covered by the exception mentioned above and they cannot be made publicly available.

In the light of the foregoing, the Commission is unable to grant access to the written observations submitted by the Governments of Cyprus, France, Hungary, Ireland and Spain.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested document(s). In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, *i.e.* in this case it must outweigh the interest protected under Article 4(2), second indent. In the present case, I see no elements capable of showing the existence of an overriding public interest in the disclosure of written observations submitted by the parties mentioned in point 3.2 above that would outweigh the public interest in the protection of the pending court proceedings.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

5. MEANS OF REDRESS

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretariat-General at the address below:

²⁰ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-793/19>

European Commission
Secretariat-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,

[signed electronically]
Daniel CALLEJA-CRESPO

Attachments: 11