



EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2020/6446**

Dear Ms Balanyá,

I refer to your letter of 11 December 2020, registered on 21 December 2020, in which you submitted 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<sup>2</sup> (hereafter ‘Regulation (EC) No 1049/2001’).

**1. SCOPE OF YOUR REQUEST**

In your initial application of 26 October 2020, addressed to the Directorate-General for Human Resources and Security, you requested access to documents that, I quote, ‘relate to any article 16, article 12B and article 40 (staff regulations) applications made by Klaus-Dieter Borchardt, former deputy Director General of DG Energy. In particular, I request a note of all Mr. Borchardt's job titles at the Commission including dates held; copies of any application(s) that he has made under article 12b, 16 and 40 to undertake a new professional activity; and all documents (correspondence, emails, meeting notes etc) related to the authorisation of the new role or roles’.

The European Commission has identified the following documents as falling within the scope of your request:

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<sup>1</sup> OJ L 345, 29.12.2001, p. 94.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

- Document extracted from the relevant staff database ('SYSPER') listing the job titles of Mr Borchardt, registered under reference Ares(2021)131750 (hereafter 'document 1');
- Declaration of the intention to engage in an occupational activity submitted by Mr Borchardt on 28 August 2020 in the framework of Article 16 of the Staff Regulations, registered under reference Ares(2020)4476057 (hereafter 'document 2');
- The decision of the Appointing Authority of 7 October 2020 concerning declaration of the intention to engage in an occupational activity submitted by Mr Borchardt, registered under reference Ares(2020)5302556 (hereafter 'document 3');
- Opinion of the Directorate-General for Energy and Cabinet Breton concerning the declaration of the intention to engage in an occupational activity submitted by Mr Borchardt, registered under reference Ares(2021)144074 (hereafter 'document 4');
- Opinion of the Secretariat-General concerning the declaration of the intention to engage in an occupational activity submitted by Mr Borchardt, registered under reference Ares(2021)144148 (hereafter 'document 5');
- Opinion of COPAR<sup>3</sup> concerning the declaration of the intention to engage in an occupational activity submitted by Mr Borchardt, registered under reference Ares(2021)144238 (hereafter 'document 6');
- Opinion of the Legal Service concerning the declaration of the intention to engage in an occupational activity submitted by Mr Borchardt, registered under reference Ares(2021)148013 (hereafter 'document 7').

Please note that documents 4, 5, 6 and 7 were not identified individually in the initial reply but were referred to as one group of documents ('e-mail exchanges within Commission services pertaining to the underlying internal procedures concerning this type of requests for authorisation').

In its initial reply of 8 December 2020, the Directorate-General for Human Resources and Security refused access to these documents based on the exceptions laid out in Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

I also note that, in its initial reply, the Directorate-General for Human Resources and Security provided abundant information concerning Mr Borchardt's declaration to engage in a remunerated occupational activity after leaving the Commission, pursuant to Article 16 as well as the approval of the Appointing Authority to carry out this occupational activity. It also explained the conditions aimed at preventing any potential conflict of interest to which such approval is subject.

In your confirmatory application, you request a review of this position concerning the documents identified above.

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<sup>3</sup> Stands for 'Commission paritaire' in French.

## **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 conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of the Directorate-General for Human Resources to refuse access to the requested documents, based on the exceptions laid down in the Article 4(1)(b) (protection of privacy and the integrity of the individual) and the second subparagraph of Article 4(3) (protection of the closed decision-making process) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning my assessment are set out below.

### **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 the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data'.

As is obvious from the titles of the requested documents, they form part of the personal file of the concerned official, which contains the documents concerning his administrative status or are inextricably linked with it.

In particular, documents 2 and 3 form part of the personal file of the staff member concerned. Documents 1, 4, 5, 6 and 7 are inextricably linked with the administrative status of the person concerned since they reflect the career history or are internal opinions of the services that were taken into account by the Appointing Authority for its decision of 7 October 2020 concerning the declaration of the intention to engage in an occupational activity submitted by Mr Borchardt.

Since all the information contained in the seven documents falling under the scope of your request constitute personal data forming part of, or being inextricably linked to, the personal file falling under Article 26 of the Staff Regulations, their disclosure would, in principle, seriously undermine the privacy of the individual concerned within the meaning of Article 4(1)(b) of Regulation 1049/2001<sup>4</sup>.

In accordance with Article 26 of the Staff Regulations, which aims *inter alia* to safeguard the privacy and integrity of present and former Commission staff, the personal file of Commission officials and other Commission staff shall be confidential. Article 26 of the Staff Regulations also clarifies that the 'personal file' of an individual includes:

- a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
- b) any comments by the official on such documents.

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<sup>4</sup> See by analogy, *Alexandrou*, judgment of 12 November 2015 in joined cases T-515/14 and T-516/14, EU:T:2015:844, paragraphs 69 and following.

Therefore, the requested documents as a whole fall under the scope of the exception provided in Article 4(1)(b) of Regulation (EC) No 1049/2001, which must be interpreted taking into account the principle of confidentiality of the personal files of members of the staff provided under Article 26 of the Staff Regulations.

Moreover, I consider that public disclosure of the requested documents would infringe the legislation regarding the protection of personal data.

In its judgment in Case C-28/08 P<sup>5</sup>, 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 data<sup>6</sup> (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC<sup>7</sup> (hereafter ‘Regulation (EU) 2018/1725’).

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

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’<sup>8</sup>.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’<sup>9</sup>.

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<sup>5</sup> Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’), C-28/08 P, EU:C:2010:378, paragraph 59.

<sup>6</sup> OJ L 8, 12.1.2001, p. 1.

<sup>7</sup> OJ L 295, 21.11.2018, p. 39.

<sup>8</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>9</sup> Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

The notion of personal data covers both the factual elements concerning the professional activity of the staff member concerned as well as the internal assessment and the final decision concerning his declaration of intention to engage in an occupational activity.

In addition to the fact that the documents requested constitute, as a whole and for the reasons explained above, personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725, please note that the documents requested also contain names, job titles and contact details of staff not forming part of the senior management of the European Commission. The names<sup>10</sup> of the person concerned, as well as other data from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

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 fulfilled 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.

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<sup>11</sup>. 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.

In your confirmatory application, you argue that there is a strong public interest to disclose the requested documents in order ‘to boost the monitoring and enforcement of the restrictions, and to be able to confirm that the Commission has done what is necessary to prevent conflict of interests’. I do not consider that your arguments are sufficient to establish the necessity of the transmission of the requested personal data.

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<sup>10</sup>. *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>11</sup> 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.

As regards the objective to ensure that the rules governing the process are observed and applied, it must be noted that, when deciding on the official's intention to engage in an occupational activity after leaving the Commission (Article 16 of the Staff Regulations), the competent Appointing Authority evaluates carefully whether the new functions risk posing any inherent or structural conflicts of interest or appearance of conflicts of interest or any other risk of breach of his obligations by the official concerned. The Appointing Authority gave its approval to carry out this occupational activity, subject to strict compliance with certain conditions aimed at preventing any actual, potential or perceived conflicts of interest that may arise in the framework of the authorised activity imposed by the Appointing Authority decision (which were explained in detail in the initial reply). Consequently, an appropriate control system is in place at the European Commission. Moreover, as explained above, in accordance with Article 26 of the Staff Regulation, the documents forming part of the personal files are strictly confidential, which in turn explains the high sensitivity of the documents being inextricably linked to the personal file.

In this context, by relying on general considerations, you have not established a need for members of the public to obtain access to documents of a personal nature for the purpose of performing additional external controls.

Moreover, you have not established that the scope of the data transfer requested is proportionate in relation to the objective pursued. I do not consider that the requested transmission would constitute the most appropriate measure with regard to your objective of ascertaining that the procedure provided by Article 16 of the Staff Regulations was properly implemented in this file.

This conclusion is further supported by the fact that, to achieve the necessary balance with Regulation (EU) 2018/1725, the Staff Regulations provide for the annual publication of specific information pertaining to the implementation of the said Article 16 concerning former senior managers engaging in activities which could entail lobbying or advocacy towards the Commission. Article 16, fourth paragraph, of the Staff Regulations states that 'each institution shall publish annually information on the implementation of the third paragraph, including a list of the cases assessed'. That provision only envisages the annual publication of summary information, as opposed to the public disclosure of the underlying correspondence between the former official concerned and the Commission and the details of the evaluation of each request. In the case of Mr Borchardt, the annual report on the activities assessed in 2020 will be published in 2021<sup>12</sup>.

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<sup>12</sup> The 2020 annual report, once available, will be published on the following link [https://ec.europa.eu/info/publications/occupational-activities-former-senior-officials-annual-report\\_en](https://ec.europa.eu/info/publications/occupational-activities-former-senior-officials-annual-report_en)

Finally, the legitimate interests of the data subject concerned would be prejudiced by the disclosure of the personal data reflected in the requested documents, as there is a real and non-hypothetical risk that such public disclosure would harm his privacy and subject them to unsolicited external contacts. Concerning the other personal data contained in the documents, such as names, job titles and contact details of staff not forming part of the senior management of the European Commission, I also note that, in your confirmatory 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 subjects' legitimate interests might be prejudiced. Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subject concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm her privacy.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, 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 the disclosure of the personal data concerned.

## **2.2. Protection of the decision-making process**

The second subparagraph of Article 4(3) of Regulation 1049/2001 provides that '[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

I consider that access to documents 4, 5, 6 and 7 needs to be refused also on the basis of this exception, in addition to the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

These four documents contain opinions for internal use. Their disclosure would reveal individual preliminary views of different services concerning the declaration of the intention to engage in an occupational activity submitted by Mr Borchardt and which were taken into account by the Appointing Authority in its decision of 7 October 2020.

Disclosure of the opinions contained in the requested documents would affect the working methods of the Commission. Indeed, the Commission's services must be able to explore all possible options in preparation of the final decision free from external pressure, in particular in cases where the decision-making process at stake relates to the confidential administrative status of staff members in the meaning of Article 26 of the Staff Regulations.

The staff in different Directorates-General should not be exposed in their individual opinions on specific decisions to be adopted by the Appointing Authority. If individual

preliminary opinions by EU staff in different Directorates-General were disclosed, it would make them more hesitant to express their opinions freely for fear of public disclosure or pressure. Such a development would be unfortunate, since it would greatly reduce the usefulness of the required opinions. Moreover, the publication of the opinions, which are inextricably linked with the personal file of staff members, could affect the confidentiality of the personal files and have a chilling effect on staff members applying for authorisations, who could censor themselves.

Therefore, public disclosure of the requested documents would seriously undermine the effectiveness of the Commission's decision-making process, also for future similar cases. The capacity of EU staff to express their opinions freely must be preserved to avoid the risk that disclosure would lead to future self-censorship, which would ultimately affect the quality of the internal decision-making of the Commission.

It follows that the European Commission cannot grant public access under Regulation (EC) No 1049/2001 to the documents containing preliminary opinions for internal use, even after the decision of the Appointing Authority was taken.

Therefore, I conclude that the refusal of access to documents 4, 5, 6 and 7 is justified also on the basis of the exception laid down in the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that there is a strong public interest to disclose the requested documents in order 'to boost the monitoring and enforcement of the restrictions, and to be able to confirm that the Commission has done what is necessary to prevent conflict of interests'.

I have already addressed this argument in the section 2.1. above, where I explained why this argument does not justify the requested transfer of personal data. I consider this explanation to be equally valid for rejecting your claim that the argument quoted above represents an overriding public interest that would outweigh the harm caused to the Commission's decision-making process by the disclosure of documents 4, 5, 6 and 7.



In addition, please note that general considerations, such as mentioned in your confirmatory application, cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question<sup>13</sup>.

Nor have I been able to identify on my side any public interest capable of overriding the public and private interests protected by Article 4(3) of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness<sup>14</sup>, provides further support to this conclusion.

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

#### **4. PARTIAL ACCESS**

I have examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation 1049/2001. However, it follows from the assessment made above that the documents which fall within the scope of your request are manifestly and entirely covered by the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) and the second subparagraph of Article 4(3) (protection of the closed decision-making process) of Regulation (EC) No 1049/2001. Also, no meaningful partial access could be granted since you requested documents concerning a clearly identified natural person.

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<sup>13</sup> Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

<sup>14</sup> Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

## 5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with 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*

*Ilze JUHANSONE*

*Secretary-General*

