DEcision of the European Commission pursuant to article 4 of the implementing rules to regulation (EC) No 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2019/4825

Dear ,

I refer to your e-mail of 18 September 2019, registered on 19 September 2019, 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 (hereafter ‘Regulation (EC) No 1049/2001’).

1. Scope of Your Request

In your initial application of 14 August 2019, addressed to the Directorate-General for Economic and Financial Affairs, you requested access to copies of ‘all communications (including emails and records/minutes of meetings) between and a) and b) (or representatives of or ), in the last year’.

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


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In its initial reply of 6 September 2019, the Directorate-General for Economic and Financial Affairs granted partial access to these documents based on the exceptions of Article 4(1)(a), fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a confirmatory review ‘in respect of the information that has been redacted from the Davos readout’ (document 1).

Please note that the document to which you refer in your confirmatory application does not contain, as such, ‘communications between Commissioner [redacted] and [redacted] or [redacted]’. Rather, the document reflects internal opinions of a Member of the Cabinet of Commissioner Moscovici regarding a meeting held between the Commissioner and the former Prime Minister of the United Kingdom. Please also note that parts of the document are out of the scope of your request, as they concern meetings with representatives of third countries and different industry sectors.

Therefore, the scope of this confirmatory decision is circumscribed to the review of the initial decision as regards the parts of document 1 concerning the meeting between Commissioner Moscovici and the former Prime Minister of the United Kingdom. The arguments that you put forward in your request have been taken into account in my assessment, set out in the corresponding sections below.

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 can inform you that further partial access is granted to document 1. As regards the undisclosed parts of this document, I regret to inform you that I have to confirm the initial decision of the Directorate-General for Economic and Financial Affairs to refuse access, based on the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

The detailed reasons underlying 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’.

In its judgment in Case C-28/08 P (Bavarian Lager)\(^3\), 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\(^4\) (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\(^5\) (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’.\(^6\)

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’.\(^7\)

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\(^6\) European Commission v The Bavarian Lager judgment, cited above, paragraph 59.

\(^7\) 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.
Document 1 contains personal data such as the names, surnames and e-mails of persons who do not form part of the senior management of the European Commission. The names 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 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. 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 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 subjects 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 their privacy and subject them to unsolicited external contacts.

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8 European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
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

Article 4(3), second subparagraph of Regulation (EC) No 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’.

In your confirmatory application, you contest the applicability of the above-referred exception with regard to the description of the meeting with the former Prime Minister of the United Kingdom. You argue that such information ‘should only be withheld if it relates to decisions being taken by ..’. You further state that ‘[t]he question of a People’s Vote, and many other aspects of Brexit, are questions for UK institutions and other individuals within the EU’.

However, for the reasons detailed below, I consider that that reliance on Article 4(3), second subparagraph of Regulation (EC) No 1049/2001 is justified and access to the relevant redacted part of document 1 must be refused based on the protection of the decision-making process.

Document 1 was drawn up by a Member of the Cabinet of Commissioner Moscovici in the context of the 2019 World Economic Forum Annual Meeting. The document is an informal debrief of bilateral meetings held by the Commissioner, and was elaborated with a purely internal purpose shortly after the meeting with the former Prime Minister of the United Kingdom. It should be underlined that the views and opinions put forward in the document reflect solely the author’s interpretation of the interventions made during the meetings and do not set any official position of the actors involved in the discussions.

Consequently, document 1 has to be considered as containing opinions for internal use, as part of deliberations and preliminary consultations within the institution in the sense of Article 4(3), second subparagraph of Regulation (EC) No 1049/2001.

Public access to the relevant redacted part of the document is likely to bring a serious harm to the institution’s decision-making process as it would deter members of the European Commission from putting forward their views on the above-referred and other related matters in an open and independent way and without being unduly influenced by the prospect of disclosure. The disclosure of these internal views, which were drawn up at short notice, would discourage the staff from discussing, in writing, issues related to sensitive dossiers of political relevance for the European Commission.
Hence, it would undermine the willingness of staff members to discuss openly and to freely exchange uncensored opinions and use this information in the accomplishment of their tasks.

Please note that the jurisprudence of the Union Courts has recognised that the capacity of the staff of the institutions to express their opinions freely must be preserved, to avoid the risk that the disclosure would lead to future self-censorship. Indeed, as the General Court has held, ‘the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process’.

I consider that these considerations apply to the case at hand. Indeed, as it has been underlined above, the document reflects the personal opinion of a Member of the Cabinet of Commissioner Moscovici recording the meeting between the Commissioner and the former Prime Minister of the United Kingdom. These views were exchanged within the Cabinet’s staff and were not meant to be disclosed to the public. Given the nature of the withheld opinion and the context in which these remarks were exchanged, I consider that the possibility for the staff to express their personal views on matters of interest to the institution should be protected in the present case.

I must conclude, therefore, that public release of the relevant withheld part of document 1 is likely to bring a serious harm to the European Commission’s decision-making process by severely affecting the ability of its members to hold frank internal discussions. Given the likelihood of the internal debate being severely impoverished by the disclosure, I consider that this risk is reasonably foreseeable and non-hypothetical. Please note that given the limited volume of the redactions, it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing the opinion of the person concerned and, thereby, depriving the exception of its very purpose.

Consequently, I take the view that the relevant undisclosed part of document 1 should be protected in accordance with Article 4(3), second subparagraph of Regulation (EC) No 1049/2001.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(3), second paragraph 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.

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In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested. Nor have I been able to identify any public interest capable of overriding the interest protected by Article 4(3), second paragraph of Regulation (EC) No 1049/2001.

The fact that the document concerned does not relate to a legislative act, for which the Court of Justice has acknowledged the existence of a need for wider openness, provides further support to this conclusion.

Please note also 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

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting further partial access to the documents requested.

As stated above, further partial access is herewith granted to document 1. I consider that a wider access to the undisclosed parts of the informal debrief would undermine the protection of international relations and would seriously undermine the protection of the decision-making process for the reasons described in Sections 2.1 and 2.2 above.

Hence, no meaningful further partial access to this document is possible without undermining the interests described above.

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,

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CERTIFIED COPY
For the Secretary-General,

For the Commission

EUROPEAN COMMISSION

Enclosures: (1)

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