



EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/6499**

Dear [REDACTED],

I refer to your letter of 29 January 2019, registered on 30 January 2019, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation (EC) No 1049/2001’).

I apologise for the delay in the handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 6 December 2018, addressed to the Directorate-General for Migration and Home Affairs, you requested access to, I quote:

‘[T]he mid-term and final reports for all the projects financed through the “[Passenger Name Record] targeted [C]all 2012” as part of the [Prevention of and Fight against Crime] (‘ISEC’) fund; the mid-term and final reports (if the latter have yet been submitted) for all the projects financed through “Call for [P]roposals restricted to Member States aiming at improving law enforcement information exchange by interconnecting Passenger Information Units (‘PIUs’) to facilitate the exchange of [Passenger Name Record] data” (2016) as part of the [Internal Security Fund]-Police budget; the mid-term and final reports (if the latter have yet been submitted) for all

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

[Passenger Name Record]-related projects financed through the “Call for [P]roposals Law enforcement information exchange” (2014) as part of the [Internal Security Fund]-Police budget’.

In its initial reply, the Directorate-General for Migration and Home Affairs considered that your request concerns documents pertaining to 14 projects under the 2012 targeted Call for Proposals HOME/2012/ISEC/AG/PNR ‘Law enforcement cooperation through measures to set up Passenger Information Units in Member States for the collection, processing, analysis and exchange of Passenger Name Record (‘PNR’) data’³; and one project under the 2014 Call for Proposals HOME/2014/ISFP/AG LAWX ‘Law Enforcement Information Exchange’⁴.

As regards the restricted Call for Proposals ISFP-2016-AG-PNR ‘aiming at improving law enforcement information exchange by interconnecting [Passenger Information Units] to facilitate the exchange of [Passenger Name Record] data’⁵, the Directorate-General for Migration and Home Affairs pointed out that it does not hold any documents falling within the scope of your application.

The European Commission has identified the following 29 documents as falling under the scope of your request:

- HOME/2012/ISEC/AG/PNR/4000004438, Mid-term Report, reference Ares(2016)4783886 (hereafter ‘document 1’);
- HOME/2012/ISEC/AG/PNR/4000004438, Final Report, reference Ares(2017)3289907 (hereafter ‘document 2’);
- HOME/2012/ISEC/AG/PNR/4000004439, Mid-term Report, reference Ares(2015)557660 (hereafter ‘document 3’);
- HOME/2012/ISEC/AG/PNR/4000004439, Final Report, reference Ares(2017)1447569 (hereafter ‘document 4’);
- HOME/2012/ISEC/AG/PNR/4000004440, Mid-term Report, reference Ares(2015)356616 (hereafter ‘document 5’);
- HOME/2012/ISEC/AG/PNR/4000004440, Final Report, reference Ares(2017)55108 (hereafter ‘document 6’);
- HOME/2012/ISEC/AG/PNR/4000004441, Mid-term Report, reference Ares(2015)358451 (hereafter ‘document 7’);

³ https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/prevention-of-and-fight-against-crime/calls/call-2012/pnr-targeted-call_en.

⁴ https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-police/calls/2014/isfp-ag-lawx_en.

⁵ https://ec.europa.eu/home-affairs/content/call-proposals-restricted-member-states-aiming-improving-law-enforcement-information_en.

- HOME/2012/ISEC/AG/PNR/4000004441, Final Report, reference Ares(2015)4066091 (hereafter ‘document 8’);
- HOME/2012/ISEC/AG/PNR/4000004443, Mid-term Report, reference Ares(2015)2090739 (hereafter ‘document 9’);
- HOME/2012/ISEC/AG/PNR/4000004443, Final Report, reference Ares(2016)6308357 (hereafter ‘document 10’);
- HOME/2012/ISEC/AG/PNR/4000004444, Final Report, reference Ares(2017)5135836 (hereafter ‘document 11’);
- HOME/2012/ISEC/AG/PNR/4000004446, Mid-term Report, reference Ares(2015)1983515 (hereafter ‘document 12’);
- HOME/2012/ISEC/AG/PNR/4000004446, Final Report, reference Ares(2017)727469 (hereafter ‘document 13’);
- HOME/2012/ISEC/AG/PNR/4000004447, Mid-term Report, reference Ares(2019)360228 (hereafter ‘document 14’);
- HOME/2012/ISEC/AG/PNR/4000004447, Final Report, reference Ares(2016)5141568 (hereafter ‘document 15’);
- HOME/2012/ISEC/AG/PNR/4000004448, Mid-term Report, reference Ares(2015)1396628 (hereafter ‘document 16’);
- HOME/2012/ISEC/AG/PNR/4000004448, Final Report, reference Ares(2016)5532260 (hereafter ‘document 17’);
- HOME/2012/ISEC/AG/PNR/4000004449, Mid-term Report, reference Ares(2019)360642 (hereafter ‘document 18’);
- HOME/2012/ISEC/AG/PNR/4000004449, Final Report, reference Ares(2019)4416829 (hereafter ‘document 19’);
- HOME/2012/ISEC/AG/PNR/4000004450, Mid-term Report, reference Ares(2015)1268767 (hereafter ‘document 20’);
- HOME/2012/ISEC/AG/PNR/4000004450, Final Report, reference Ares(2016)6242131 (hereafter ‘document 21’);
- HOME/2012/ISEC/AG/PNR/4000004451, Mid-term Report, reference Ares(2019)360920 (hereafter ‘document 22’);
- HOME/2012/ISEC/AG/PNR/4000004451, Final Report, reference Ares(2017)35062 (hereafter ‘document 23’);

- HOME/2012/ISEC/AG/PNR/4000004452, Mid-term Report, reference Ares(2015)411368 (hereafter ‘document 24’);
- HOME/2012/ISEC/AG/PNR/4000004452, Final Report, reference Ares(2016)5769851 (hereafter ‘document 25’);
- HOME/2012/ISEC/AG/PNR/4000004453, Mid-term Report, reference Ares(2015)408657 (hereafter ‘document 26’);
- HOME/2012/ISEC/AG/PNR/4000004453, Final Report, reference Ares(2016)5361322 (hereafter ‘document 27’);
- HOME/2014/ISFP/AG/LAWX/7150, Mid-term Report, reference Ares(2016)6355299 (hereafter ‘document 28’);
- HOME/2014/ISFP/AG/LAWX/7150, Final Report, reference Ares(2017)4833421 (hereafter ‘document 29’).

The requested documents were drawn up by the relevant authorities of awarded Member States under the Call for Proposals funded through the ‘Prevention of and Fight against Crime’ (‘ISEC’)⁶ and the ‘Internal Security Fund’ (‘ISFP’)⁷ programmes. The documents were drawn up in order to assess mid-term and final progress for the projects concerned.

In particular, documents 1-27 concern the 2012 targeted Call for Proposals HOME/2012/ISEC/AG/PNR, which aims at ‘supporting law enforcement cooperation through measures to set up Passenger Information Units in Member States for the collection, processing, analysis and exchange of Passenger Name Record (‘PNR’) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime’⁸. Documents 28 and 29 concern the 2014 Call for Proposals HOME/2014/ISFP/AG LAWX ‘Law Enforcement Information Exchange’, which aims at ‘supporting projects in two specific areas: a) cross-border information exchange and b) data sharing between Passenger Information Units’⁹.

In its initial reply of 29 January 2019, the Directorate-General for Migration and Home Affairs refused access to the above-mentioned documents based on the exceptions of Article 4(2), first indent (protection of commercial interests) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position and you put forward a series of arguments in support of your request. These have been taken into account in my assessment, set out in the corresponding sections below.

⁶ https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/prevention-of-and-fight-against-crime_en.

⁷ https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-police/union-actions_en.

⁸ See Point 2 of the Call.

⁹ See Point 2 of the Call.

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:

- partial access is granted to documents 7, 10, 14, 16, 19, 26 and 28 based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- partial access is granted to documents 1, 5, 8, 9, 15, 18, 22, 29 based on the exceptions provided for under Article 4(2), first indent (protection of commercial interests) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- partial access is granted to documents 11, 21, 23 and 27 on the basis of the exceptions provided for under Article 4(1)(a), first indent (protection of the public interest as regards public security) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- partial access is granted to documents 2, 3, 4, 6, 12, 13, 17, 20, 24 and 25 pursuant to Article 4(1)(a), first indent (protection of the public interest as regards public security), Article 4(2), first indent (protection of commercial interests) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning my assessment are set out below.

2.1. Consultation of the Member States

According to Article 4(4) of Regulation (EC) No 1049/2001, '[a]s 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'.

Article 4(5) of Regulation (EC) No 1049/2001 provides that '[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement'.

Under Article 4(4) and 4(5) of Regulation (EC) No 1049/2001 and taking into account the arguments you put forward in your confirmatory application, the Secretariat-General of the European Commission consulted the authorities of Austria, Bulgaria, Estonia, Finland, France, Hungary, Latvia, Lithuania, Netherlands, Portugal, Romania, Slovenia, Sweden and Spain, as the requested documents originate from them. The outcome of these consultations have been taken into account in the context of this confirmatory review.

2.2. Protection of the public interest as regards public security

Article 4(1)(a), first indent of Regulation (EC) No 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 public security'.

In its judgment in Case T-74/16 (*Pagkyprios Organismos Ageladotrofon v Commission*), the General Court clarified that 'before refusing access to a document originating from a Member State, the institution concerned must examine whether that Member State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation No 1049/2001 and has given proper reasons for its position. Consequently, when taking a decision to refuse access, the institution must make sure that those reasons exist and refer to them in the decision it makes at the end of the procedure'.¹⁰

The General Court clarified in this judgment that the institution 'must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document applied for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access provided for in Article 4(1) to (3) of the regulation applies'.¹¹

The General Court also clarified that 'the institution to which a request for access to a document has been made does not have to carry out an exhaustive assessment of the Member State's decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001.[...] The institution must, however, check whether the explanations given by the Member State appear to it, *prima facie*, to be well founded'.¹²

Furthermore, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, 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 Court's 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'.¹³

Moreover, the General Court ruled that, as regards the interests protected by Article 4(1)(a) of Regulation (EC) 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

¹⁰ Judgment of the General Court of 8 February 2018, *Pagkyprios Organismos Ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 55.

¹¹ *Pagkyprios Organismos Ageladotrofon v Commission* judgment quoted above, paragraph 56.

¹² *Ibid*, paragraph 57.

¹³ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

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'.¹⁴

In reply to the consultation of the European Commission, the authorities of the Member States concerned outlined that documents 2-4, and 23-25 contain sensitive information the disclosure of which would undermine the protection of public security in the sense of Article 4(1)(a), first indent of Regulation (EC) No 1049/2001.

In particular, the authorities of Finland argued that document 2 describes the Finish Passenger Name Record setup containing the national databases. According to the Finish authorities, the disclosure of this information, which is classified as restricted, would undermine the interest in protecting public security.

Documents 3 and 4 include lists of air carriers whose data are inserted in the French Passenger Name Record system and the national authorities and services that are habilitated to use the system. They define the organisational structure of the Passenger Information Unit. They also contain precise information regarding the installation and the location of the French Passenger Information Unit, its perimeter security and access control systems, including architectural plans and photographs of the staff, premises and certain facilities whose access is restricted to military staff. Moreover, the documents include lists of national files, including the so-called 'Fichier des Personnes Recherchées'.

According to the French authorities, public access to the above-referred information would put at risk the public security and the protection of defence and military matters. It would enable offenders to avoid controls by choosing airlines which are not yet integrated to the network. The disclosure of information regarding warning and security control systems, and the description of the installations, would seriously compromise the security of the staff and the premises concerned, which may be subject to hostile actions. In addition, revealing details on the above-referred files would allow conclusions on the risk of being arrested.

Furthermore, documents 3 and 4 include the details on hardware and security software, including the brand, model and version of the materials. They also describe in detail the software functionalities, the expected results and the final results of the performance tests. In the opinion of the French authorities, the disclosure of this information cannot be granted without compromising public security. Indeed, the information could be used by potential criminals to escape control of the surveillance system. It would facilitate (cyber) attacks by revealing detailed information on software and warning systems which are used for the purpose of preventing terrorist attacks and serious offences. Moreover, it would allow conclusions about possible shortcomings in the system.

Document 23 contains detailed information regarding the software and hardware used for the Hungarian Passenger Information Unit. It reflects the components, functionality and

¹⁴ Judgment of the General Court of 11 July 2018, *ClientEarth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23.

data connections of the system. Parts of the document refer to the results of the tests performed by relevant authorities. It also contains information on the system users. According to the Hungarian authorities, granting access to this information, which is of a sensitive nature, would undermine the protection of the public interest as regards public security.

Documents 24 and 25 contain concrete information concerning the staff of the Bulgarian Passenger Information Unit and relevant national agencies. In addition, they indicate the technical and software equipment, and the detailed results of the performance tests. In the opinion of the authorities of Bulgaria, full access to these elements would be detrimental to the protection of public security, as it would allow conclusions on the technical, operative and human resources of the Bulgarian Passenger Information Unit.

I have carried out an assessment at first sight of the replies provided by the Member States concerned and have come to the conclusion that their arguments justify at first view the non-disclosure of the relevant parts of documents 2-4, and 23-25 based on the exception provided for in Article 4(1)(a), first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001. In addition, I have concluded that parts of documents 6, 11-13, 17, 20 and 21 need to be withheld on the same grounds, as they contain information regarding, inter alia, the creation of information technologies platforms, technical functionalities of the system and the results of the tests performed by the concerned beneficiaries. They also indicate the specific number of the staff from the Passenger Information Units and relevant national authorities.

Indeed, public access to the withheld parts of these documents would reveal sensitive information concerning the implementation of the national Passenger Information Units, including the details on the equipment, installations and the staff concerned. It would disclose specific information on the involvement of the national authorities conducting activities for the internal security and the testing results. Such information, if publically disclosed, could be instrumentally used by potential offenders in their benefit. It would facilitate the planning of possible attacks by revealing elements which could be used to compromise the security of the system and undermine its effectiveness.

Hence, there is a risk that a full disclosure of these documents would compromise the operability of the Passenger Name Records system in the Member States concerned and thus jeopardise their capacity to collect and process data in order to prevent attacks and investigate terrorism and criminal activities. Given the detailed nature of the information concerned, I consider that this risk is real and non-purely hypothetical.

Having regard to the above, I concluded that the use of the exception under Article 4(1)(a), first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001 is justified as regards the relevant withheld parts of documents 2-4, 6, 11-13, 17, 20, 21, 23-25 and that access to them must be refused on that basis.

2.3. Protection of commercial interests of a natural or legal person

Article 4(2), first indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'.

In your confirmatory application, you argue that the requested documents cannot be considered in their entirety as commercially sensitive. You refer to the judgment of the General Court in Case T-136/15 (*Evropaiki Dynamiki v European Parliament*)¹⁵, in which the General Court held that 'even if disclosure of the relationship between the tasks to be performed and the number of working days necessary to complete them could enable the tenderers, in future public procurement procedures, to unveil the [European Parliament]'s costing technique, the fact that tenderers could know the prices quoted in the past for a corresponding service seems more likely to lead to a situation of genuine competition than to a situation where competition would be distorted [...]'¹⁶. In your opinion, such conclusions apply to the case at hand.

Moreover, you point out that two of the documents relate to projects which are closed. You also argue that the majority of the requested documents concern a procedure, the creation of Passenger Information Units for the processing of personal data, which is unlikely to be repeated on similar terms in the Member States for a considerable period. In addition, you request that the relevant Member States be consulted on the disclosure of the documents requested.

Please note that the above-referred judgment concerns a specific category of documents – requests for quotations issued by institutions under a given framework contract – which differ from the documents at hand both as regards their originator and their nature.

Moreover, I would like to underline that the Member States concerned have been consulted as per the arguments you put forward in your confirmatory application. In reply to the consultation of the European Commission, the authorities of the relevant Member States argued that parts of documents 2, 5, 6, 18, 22, 24, 25, 29 cannot be granted as disclosure would undermine the protection of commercial interests in the sense of Article 4(2), first indent of Regulation (EC) No 1049/2001.

From an examination at first sight of the replies provided by the Member States concerned, I concluded that their objection to a full disclosure is founded, as parts of the documents contain commercially sensitive information of the beneficiaries.

Indeed, the relevant withheld parts of the documents contain information related to the involvement of partners, participating authorities, experts and/or private entities, the name of supplier companies and other information of commercial value.

¹⁵ Judgment of the General Court of 14 December 2017, *Evropaiki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Parliament*, T-136/15, EU:T:2017:915.

¹⁶ Ibid, paragraph 71.

They reflect the identity of participants in procurement procedures organised at a national level, including the identity of rejected tenderers. Moreover, parts of the documents contain the initial estimated expenditure of the projects and the breakdown of budgets, which explains in detail the allocation of sums required for the performance of the projects. Disclosure to the public of such information would undermine the protection of the expertise of the authorities and the private entities concerned and thus prejudice their legitimate economic interests.

Please note that the case law of the General Court has clarified that the exception relating to commercial interests can be applied to non-commercial entities, such as non-profit associations and public entities applying for a grant.¹⁷

Against this background, it results that the above-mentioned information indeed qualifies as commercially sensitive information and that access to the relevant redacted parts of the documents cannot be granted as it would pose a real and non-hypothetical risk for the commercial interests of the entities concerned.

Consequently, I must conclude that the use of the exception under Article 4(2), first indent of Regulation (EC) No 1049/2001 on the grounds of protecting commercial interests of a natural or legal person is justified, and that access to the relevant parts of documents 2, 5, 6, 18, 22, 24, 25, 29 must be refused on that basis. The parts of documents 1, 3, 4, 8, 9, 12, 13, 15, 17, 20 reflecting information of a similar nature must be withheld as well for the above-referred reasons.

2.4. 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 your confirmatory application, you point out that your request 'is not concerned with those parts of the documents in question that cannot be disclosed in accordance with the data protection legislation'. Nevertheless, I would like to provide additional explanations on how public release of the requested documents would undermine the public interest protected by the above-mentioned exception.

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹⁸, 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

¹⁷ See in this regard, judgment of the General Court of 21 October 2010 in Case T-439/08, *Kalliope Agapiou Joséphidès v European Commission and Education, Audiovisual and Culture Executive Agency*, EU:T:2010:442, paragraphs 127-128.

¹⁸ 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.

Community institutions and bodies and on the free movement of such data¹⁹ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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/EC²⁰ (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 of Justice 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’.²¹

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’.²²

The requested documents contain personal data, in particular the names, surnames, contact details and handwritten notes and signatures of representatives of the beneficiaries and of persons who do not form part of the senior management of the European Commission. The names²³ 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’.

¹⁹ OJ L 8, 12.1.2001, p. 1.

²⁰ OJ L 205, 21.11.2018, p. 39.

²¹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

²² 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.

²³ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

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.²⁴ 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.

As to the handwritten signatures appearing in the requested documents, which constitute biometric data, there is a risk that their disclosure would prejudice the legitimate interest of the persons concerned.

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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first indent 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 the disclosure.

²⁴ 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal.²⁵

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the requested documents. Nor have I been able to identify any public interest capable of overriding the interest protected by Article 4(2), first indent 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,²⁶ provides further support to this conclusion.

Please note also that Article 4(1)(a), first indent and Article 4(1)(b) of Regulation (EC) No 1049/2001 do 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 partial access to the documents requested.

As stated above, partial access is herewith granted to documents 1-29. For the reasons explained in sections 2.2 - 2.4 above, I consider that no meaningful further partial access is possible without undermining the protection of the interests concerned.

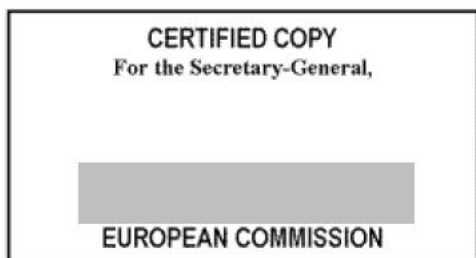
²⁵ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

²⁶ 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



Enclosures: (29)