



EUROPEAN COMMISSION

Brussels, 3.12.2021  
C(2021) 8950 final

Ms Audrey Changoe  
Friends of the Earth Europe  
26 rue d'Edimbourg,  
1050 Brussels  
Belgium

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

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2021/4655**

Dear Ms Changoe,

I refer to your email of 5 October 2021, registered on 8 October 2021, 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 documents<sup>2</sup> (hereafter 'Regulation (EC) No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 20 July 2021, addressed to the Directorate-General for Trade, you requested access to, I quote: 'All documents - including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, operational conclusions, lines to take, e-mails, and presentations, correspondence (i.e. any emails, correspondence, telephone call notes, and/or text messages including WhatsApp exchanges) – related to meetings held between [X]<sup>3</sup> - former head of [...] Unit- and

---

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

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

<sup>3</sup> In your initial application, you refer to the identified individual (a staff member of the European Commission not holding any senior management position). The name of that individual has been replaced by 'X' in this decision.

representatives of companies and business associations on issues related to the EU Mercosur Free Trade Agreement.’

On 16 September 2021, the Directorate-General for Trade sent you a negative initial reply based on the exception of 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. You underpin your request with arguments, which I will address 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 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 Trade as the European Commission is not in a position to identify the documents falling within the scope of your confirmatory application without interfering with the right to privacy and data protection based on the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001, for the reasons 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*)<sup>4</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>5</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>6</sup> (hereafter ‘Regulation (EU) 2018/1725’).

---

<sup>4</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>5</sup> Official Journal L 8, 12.1.2001, p. 1.

<sup>6</sup> Official Journal L 295, 21.11.2018, p. 39.

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>7</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>8</sup>.

In the *VG v Commission* judgment, the General Court ruled that even anonymised data should be considered as personal data, if it would be possible to link them to an identifiable natural person through additional information<sup>9</sup>.

In the present case, a clear link to an identifiable person remains, since your request focuses on an identified natural person. Therefore, it is clear that even the mere identification of the documents requested implies the processing of personal data and the information about the existence of documents would constitute processing of personal data, as this information cannot be disassociated from the natural person it concerns.

The identified natural person mentioned in your request does not form part of the senior management of the European Commission in the context of your request.

In the *Nowak* judgment<sup>10</sup>, the Court of Justice has acknowledged that ‘[t]he use of the expression “any information” in the definition of the concept of “personal data”, within Article 2(a) of Directive 95/46, reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it “relates” to the data subject’. As regards the latter condition, it is satisfied where the information, by reason of its content, purpose or effect, is linked to a particular person (emphasis added).

In your confirmatory request, you ask, I quote: ‘If you are not able to disclose the entirety of the documents, I would request you consider partial disclosure – specifically, it is the

---

<sup>7</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>8</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.

<sup>9</sup> Judgment of the General Court of 27 November 2018, *VG v Commission*, Joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 74.

<sup>10</sup> Judgment of the Court of Justice of 20 December 2017, *Peter Nowak v Data Protection Commissioner* (Request for a preliminary ruling from the Supreme Court), C-434/16, EU:C:2017:994, paragraphs 34-35.

name of the companies and business associations together with the material contents of meeting minutes or correspondence that is of public interest, even if personal names, email addresses, phone numbers etc are redacted as personal data.’

However, this would lead to a situation in which you personally would have access to privileged information since you would know that it relates to the data subject concerned. Moreover, the Secretariat-General considers that the mere identification of documents in the context of your request constitutes processing of personal data, which undermines the protection of privacy and the integrity of the data subject concerned.

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<sup>11</sup>.

You state that the European Commission has placed the data subject’s former position in the public domain. You add, I quote: ‘I therefore fail to see how [X]’s name and position can constitute personal data that cannot be revealed under access to documents regulation.’

In this regard, the Secretariat-General would like to emphasize that your request targets personal data that go beyond the data subject’s name, surname and function as you requested all documents related to certain meetings of the data subject (emphasis added). As pointed out above, this information, which would not be possible to disassociate from the said data subject, therefore constitutes personal data. The mere fact that the data subject’s name, surname and function are in the public domain is therefore irrelevant in case of your request.

Moreover, you state that the data subject, I quote ‘[...] is a Head of Unit, which is clearly quite a senior position.’ You argue that your previous request targeted at a different data subject holding a Head of Unit position within DG TRADE was handled differently as you were informed that DG TRADE did not hold any documents that would correspond to the description given in your application. To quote your argument: ‘In other words, the application was not refused, information was disclosed about his lack of such meetings [...] despite the arguments raised by DG Trade in their refusal of my request, other similar requests regarding individually named Commission staff members to other DGs have been accepted and documents released, without this issue being raised. For example, a number of access to document requests regarding Nathalie Tocci and her interactions with various DGs of the European Commission have received the information, after consent from Ms Tocci.’

Contrary to this claim, the Secretariat-General would like to point out that staff members of the European Commission in the position of a Head of Unit indeed do not form part of the senior management. However, Cabinet members are considered as forming part of the senior management. While more transparency is provided to certain documents related to persons who hold a special adviser function in line with Commission Decision

---

<sup>11</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

C(2007)6655 regarding rules on special advisers to the Commission<sup>12</sup> and the specific privacy statement<sup>13</sup>, this cannot be extended to staff members holding a Head of Unit position.

In your confirmatory application, you invoke that, I quote: ‘As the General Court of the European Union stated, if comparable documents are in the public domain, disclosure of the contested documents cannot be withheld (Case T-167/10, paras. 87-88). Indeed, the Commission fails to demonstrate that disclosing this information would cause harm, as disclosure of the many comparable documents containing similar data was not deemed to cause any.’

While indeed the General Court has accepted in *Evropaïki Dynamiki* judgment<sup>14</sup> that disclosure of certain documents cannot be withheld if similar information is also contained in the public domain, the situation is not comparable. The information concerned by your request has not been made public either by the European Commission or by the data subject concerned.

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>15</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,

---

<sup>12</sup> [https://ec.europa.eu/info/sites/default/files/commission-decision-rules-on-special-advisers\\_c2007\\_6655\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/commission-decision-rules-on-special-advisers_c2007_6655_en_0.pdf)

<sup>13</sup> [https://ec.europa.eu/info/sites/default/files/privacy\\_statement\\_-\\_special\\_advisers\\_-\\_may\\_2020.pdf](https://ec.europa.eu/info/sites/default/files/privacy_statement_-_special_advisers_-_may_2020.pdf)

<sup>14</sup> Judgment of the General Court of 6 December 2012, *Evropaïki Dynamiki v Commission*, T-167/10, EU:T:2012:651, paragraphs 87-88.

<sup>15</sup> Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

To establish the necessity to have the data transmitted, you argue that, I quote: '[...] the EU-Mercosur Trade Agreement has significant environmental, climate, social and human rights implications, in both the EU and Mercosur countries; - the interactions between the Head of DG Trade's responsible Unit with business stakeholders that have a lot to gain (or lose) from the implementation of the deal, or changes to the current Agreement in Principle, are therefore of great public interest; - The European Commission claims that it is "strongly committed to ensuring trade policy is transparent and inclusive in order to enhance legitimacy and public trust." (<https://trade.ec.europa.eu/doclib/html/157486.htm>) The Commission therefore recognises the enormous importance and overriding public interest in transparency around trade policy-making. For these reasons, the disclosure of the documents I have requested is of overriding public interest and necessary for public scrutiny of EU institutions in the context of a trade deal that has caused large amounts of public concern.'

That argument cannot justify the transmission of the personal data at stake, which may fall within the notion of 'private life' regardless of whether this data is registered in the context of a professional activity<sup>16</sup>. Following your reasoning, when requesting access to documents concerning personal data, all applicants invoking the principle of transparency in certain sphere of the European Commission's political competence would gain access to said personal data.

Moreover, the General Court confirmed in the *Psara* judgment that general considerations relating to the public interest in the disclosure of personal data regarding parliamentary mandate holders in order to guarantee the public right to information and transparency do not establish the need for the transfer of the personal data<sup>17</sup>. This conclusion applicable to parliamentary mandate holders is all the more relevant in relation to natural persons who do not form part of the senior management of the European Commission.

Against this background, the Secretariat-General emphasises that the mere identification of documents in the context of your request entails the processing of personal data, which constitutes an interference with the right to privacy and data protection and is not proportionate and necessary in the public interest.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subject concerned would be prejudiced by the processing of the requested personal data, as there is a real and non-hypothetical risk that the mere identification of documents in the context of your request would harm the privacy and subject the natural person concerned to unsolicited external contacts.

---

<sup>16</sup> Judgment of the General Court of 19 September 2018, Case T-39/17, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

<sup>17</sup> Judgment of the General Court of 25 September 2018, *Psara et al. v European Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraphs 73-76.



Consequently, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, the European Commission is not in a position to identify the documents requested, as the need to obtain access to the personal data of the data subject concerned for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individual concerned would not be prejudiced by the disclosure of the personal data concerned.

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

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

### **4. PARTIAL ACCESS**

Pursuant to Article 4(6) of Regulation (EC) No 1049/2001, ‘If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.’

However, as the Secretariat-General is not in a position to identify the documents that fall within the scope of your confirmatory application without undermining the interests described above, it is neither in a position to consider the possibility of granting partial access to the documents requested.

### **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*

