EUROPEAN COMMISSION

Brussels, 3.12.2021
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Mr Arun Dohle
Against Child Trafficking
Keizersgracht 482,
1017EG Amsterdam
Netherlands

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION NO (EC) 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2021/5166, 2021/5167, 2021/5168, 2021/5327**

Dear Mr Dohle,

I refer to your email of 4 October 2021, registered on 6 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[2] (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

On 22 August 2021, you submitted three initial applications addressed to the Secretariat-General and the Directorate-General for Human Resources and Security requesting access to the following documents, I quote:

- 'The Ares registration fiche of the letters which MEP Ana Gomes sent to FVP Timmermans in July 2015, and in 2017 related to [X][3], including all related

1 Official Journal L 345, 29.12.2001, p. 94.
2 Official Journal L 145, 31.5.2001, p. 43.
3 In your initial applications, you refer to the identified individual who is neither a public figure in a public capacity nor a member of the senior management of the European Commission. The name of that individual has been replaced by 'X' in this decision.

correspondence in whatever form. (registered under reference GESTDEM 2021/5166);
- Ares Registration fiches and related correspondence related to the letters to Commissioners Oettinger and Timmermans sent per registered mail by [X] in August 2018. (registered under references GESTDEM 2021/5167 and GESTDEM 2021/5327);
- All correspondence, internal/external, about [X]. Including the Ares registration fiches. And also including documents related to Mr. Oettinger's decision to agree to the retro-active retirement and retroactive back payments. (registered under reference GESTDEM 2021/5168).'

In its initial reply to your requests registered under references GESTDEM 2021/5166 and GESTDEM 2021/5167, the Secretariat-General, on 3 October 2021, refused access to these documents 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 its initial reply to your requests registered under references GESTDEM 2021/5168 and GESTDEM 2021/5327, the Directorate-General for Human Resources and Security, on 24 September 2021, refused access to these documents 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 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*)[4], 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[5] (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[6] (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'[7].

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'[8].

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[9].

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

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4 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.

5 Official Journal L 8, 12.1.2001, p. 1.

6 Official Journal L 295, 21.11.2018, p. 39.

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

8 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.

9 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.

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[10], 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).

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[11].

The General Court acknowledged that an institution cannot, on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001, refuse access to documents on the ground that their disclosure would undermine the privacy and integrity of an individual, when the documents in question contain personal data exclusively concerning the applicant for access[12]. However, that case law is not applicable to the present case insofar as the applicant for access is different from the data subject whose personal data are concerned by the request for access.

Moreover, the General Court confirmed in Case T-611/15 that if a legal person submits an application for access on behalf of another individual, the institution does not have to verify whether the power of representation by the former has been laid down in a specific mandate[13].

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

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10 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.

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

12 Judgment of the General Court of 22 May 2012, *Internationaler Hilfsfonds eV* v *European Commission*, T-300/10, EU:T:2012:247, paragraphs 107-109, Judgment of the General Court of 12 May 2015, *Unión de Almacenistas de Hierros de España* v *European Commission*, T-623/13, EU:T:2015:268, paragraph 91.

13 Order of the General Court of 26 October 2016, *Edeka-Handelsgesellschaft Hessenring mbH v. Commission*, T-611/15, EU:T:2016:643, paragraphs 41-45.

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[14]. 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.

To establish the necessity to have the data transmitted, you argue that, I quote: 'You may know that this issue is fully in the public domain since 2007. Numerous newspaper particle, documentaries, podcasts have been broadcasted worldwide. All this has resulted in a resolution that was unanimously adopted by the Dutch Parliament in 2019. As for the public interest, there is growing interest in the subject of trafficking for children for adoption. […] there have been more and more national investigations launched. Some governments have offered apologies. All this is closely connected to the European Commission's treatment of the Task Manager of the Romanian Children File. It is, therefore, in the public interest, the public good, to understand how whistleblowers are being dealt with. This also in view of future whistleblowers who need to understand the institution's attitude and actions towards whistleblowing.'

That general argument pertaining to the identified Task Manager 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[15]. In the present case, the requested data relate to private life insofar as they concern the statutory situation of the identified person.

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[14] 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.

[15] 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.

Abstract and general references to an interest in understanding the institution's attitude and actions towards whistleblowing cannot justify the need for the processing nor the transmission of the personal data, let alone its proportionality.

In addition, the scope of your request is not connected to the policy related to the subject of trafficking of children for adoption and accordingly that argument cannot justify the need for processing the requested personal data under Article 9(1)(b) of Regulation (EU) 2018/1725.

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[16]. This conclusion applicable to parliamentary mandate holders is all the more relevant in relation to civil servants who are not public figures.

Moreover, while the General Court has accepted in *Evropaïki Dynamiki*[17] that disclosure of certain documents cannot be withheld if comparable documents are in the public domain, the present situation is not comparable. The information concerned by your request has not been made public either by the European Commission or, to the Secretariat-General's knowledge, by the data subject concerned.

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.

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.

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16 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.

17 Judgment of the General Court of 6 December 2012, *Evropaïki Dynamiki v Commission*, T-167/10, EU:T:2012:651.

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