



EUROPEAN COMMISSION

Secretariat-General

The Secretary-General

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By registered mail:

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DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹

Subject: Your confirmatory applications for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2015/3715 and 2015/3703

Dear Ms Cann,

I refer to your letter, registered on 3 September 2015, in which you submit two confirmatory applications in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUESTS

In your initial application of 13 July 2015, addressed to the Secretariat-General (SG) and registered under reference GESTDEM 2015/3715, you requested *further to the documents already received GestDem 2015/1110, copies of all subsequent applications by former Commissioner Androulla VASSILIOU which seeks Commission authorisation for new professional activities under the commissioner code of conduct, including as a Member of the Board of Trustees of the Cyprus Research and Educational Foundation and as Representative of the Republic of Cyprus on the High Council of the European University Institute. I would further like to request any emails, correspondence and meeting notes which relate to these applications; all opinions from the ad hoc ethical committee on each case; and copies of the Commission's final decision in each case.*

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

In your second initial application of 13 July 2015, addressed to the Secretariat-General (SG) and registered under reference GESTDEM 2015/3703, you requested, *further to Gestdem 2015/337, all documents which relate to the authorisation of Ms Hedegaard's sixth new activity.*

1.1. The initial reply to your request Gestdem 2015/3715

In its initial reply to your request GESTDEM 2015/3715, pertaining to former Commissioner Vassiliou, Directorate B of the SG identified 14 documents as falling within the scope of your request. It:

- granted full access to the cover note of documents 4 and 14 and full access to the draft decision annexed to document 9;
- informed you that documents 3 and 12 were publicly available;
- granted partial access to documents 1 to 3, 6, 7, 9 to 11 and 13;
- refused access to documents 5 and 8.

Access to the withheld documents or parts thereof was refused on the basis of Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and integrity of the individual). The lists of the documents identified at initial level are attached to this decision. The withheld documents or parts thereof concerned two requests for authorisation of post-mandate activities that had not been submitted to the College for a decision after former Commissioner Ms Vassiliou had withdrawn them. In addition, parts of the documents contained personal data of the former Commissioner (for example, e-mail and postal address) and personal data (for example, names and other data) enabling the identification of non-senior Commission staff, as well as contractual details.

1.2. The initial reply to your request Gestdem 2015/3703

In its initial reply to your request GESTDEM 2015/3703, pertaining to former Commissioner Hedegaard, Directorate B of the Secretariat-General identified 14 documents as falling within the scope of your request:

- As regards documents 1-9, it explained that these had already been partially disclosed in the SG's reply of 3 February 2015 to a previous initial request³. It informed you that access to the withheld parts was refused on the basis of Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and integrity of the individual);
- As regards documents 10-14 which were identified as falling within the scope of the new request, it also refused access to the withheld (parts of the) documents on the basis of Article 4(1)(b) of Regulation 1049/2001.

³ Your request GESTDEM 2015/337.

Access to the withheld (parts of the) documents was refused as they concerned a request for authorisation of post-mandate activities that had not been submitted to the College for a decision after former Commissioner Ms Hedegaard had withdrawn it. In addition, parts of the documents contained personal data of the former Commissioner (for example, e-mail and postal address) and personal data (for example, names and other data) allowing the identification of non-senior Commission staff.

1.3. Your confirmatory applications

By your confirmatory applications, you request a review of both initial decisions.

As regards the non-disclosed parts of documents 1-9 identified as covered by your request GESTDEM 2015/3703, I confirm that I have not been able to identify any new relevant circumstances justifying a re-examination of the initial decision taken further to your earlier request for access to documents registered under GESTDEM reference 2015/337, which had the same scope. Consequently, refusal of access to the withheld parts of documents 1-9 has to be confirmed, based on the reasoning set out in that earlier initial decision.

As regards the remainder of your request, you expressly indicate that you do not *request personal data such as email addresses etc.* I infer from this comment that you do not contest the initial decisions to redact the e-mail and postal address of the former Commissioner, nor the names or other data allowing the identification of non-senior Commission staff.

You expressly indicate that you *request information that relates to Commission actions and deliberations.* You claim that *without transparency on these matters it is impossible for third parties to conduct a full assessment of whether the Code of Conduct for Commissioners is being effectively and consistently applied and implemented.* You further state that *the implementation of the Code of Conduct of Commissioners is a legitimate area of public interest.* You refer to a letter written to Alter-EU in June 2011 by the previous Secretary-General, according to which *the Commission is also aware of your interest in decisions related to activities of former Commissioners. We are committed to ensuring full transparency of these decisions, whether approving, rejecting or imposing possible restrictions and/ or conditions. We intend to publish these decisions on the Europa web site[...]* Finally, you refer to a past situation, comparable, in your view, where the Commission did release documents relating to a withdrawn post-mandate activity of a former Commissioner.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts an independent review of the reply given by the Directorate-General concerned at the initial stage.

Following this assessment, I regret to inform you that the Commission has to confirm the refusal of the SG to disclose the withheld documents and parts thereof (i.e. the withheld parts of documents 1 to 3, 6, 7, 9 to 11 and 13 identified in GESTDEM 2015/3715; documents 5 and 8 identified in GESTDEM 2015/3715; and documents 10-14 identified in GESTDEM 2015/3703), based on the exceptions set out in Article 4(1)(b) (protection of the privacy and integrity of the individual) and in Article 4(2), first indent (protection of commercial interests) of Regulation 1049/2001, as explained below.

2.1. Consultation of Third Parties

A number of the withheld documents originate from the former Commissioners themselves and the withheld parts relate to their withdrawn applications. Under the provisions of Article 4(4) of Regulation 1049/2001 and with a view to take into account the arguments put forward in your confirmatory application, a third party consultation of the former Commissioners was initiated.

In reply to these consultations, former Commissioner Ms Vassiliou considered that the withheld documents and parts thereof should not be disclosed, because former Commissioners do not have an obligation to reveal withdrawn applications. She considered that these constitute personal data and are of private concern. Consequently, former Commissioner Ms Vassiliou objected to disclosure of the requested documents and parts thereof on the basis of Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and integrity of the individual). Former Commissioner Ms Hedegaard wants to maintain the refusal on the grounds of protection of her privacy.

As I will explain in detail below, I consider that Ms Vassiliou's and Ms Hedegaard's arguments are correct.

2.2. Protection of privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that access to documents is refused where disclosure would *undermine the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

Article 2(a) of Data Protection Regulation 45/2001⁴ ('the Data Protection Regulation') provides that '*personal data*' shall mean *any information relating to an identified or identifiable person [...].* As the Court of Justice confirmed in case C-465/00 (*Rechnungshof*)⁵, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life".*

I note that you do not dispute that the data relating to the withdrawn applications of the former Commissioners is personal data according to Regulation 45/2001.

⁴ 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, Official Journal L 8 of 12.1.2001, p. 1.

⁵ Judgment of the Court of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, paragraph 73.

The Court of Justice has confirmed that *where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof.*⁶ Pursuant to Regulation 45/2001, personal data must be processed fairly and lawfully. Any processing must be necessary for a specific purpose and proportionate to this purpose. Furthermore, pursuant to Article 8 of Regulation 45/2001, *without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or b) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority or if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.*

By requiring the institutions to examine the risk that the protection of privacy and of the integrity of the individual may be undermined under Regulation 45/2001 and the restrictions and limitations thereby imposed on the processing of personal data, notably by means of Article 8(b) thereof, Article 4(1)(b) of Regulation 1049/2001 indirectly requires the applicant to establish, through the provision of one or more express and legitimate reasons, the necessity of the transfer of the personal data contained in the documents to which he has requested access. Article 8(b) of Regulation 45/2001 requires the institution to make an assessment of the necessity, and thus the proportionality, of the transfer of personal data in the light of the applicant's objective.

That same Article 8(b) of Regulation 45/2001 requires that institution, if the necessity has been substantiated to examine whether there are reasons to think that the personal data transfer might prejudice the legitimate interests of the data subjects concerned, taking into account the applicant's justification for the transfer of these personal data and thus for access to the documents.

2.2.1. *On the necessity of the transfer*

Following constant case law, *"if the condition of necessity is to be fulfilled, it must be established that the transfer of personal data is the most appropriate of the possible measures for attaining the applicant's objective, and that it is proportionate to that objective, which means that the applicant must submit express and legitimate reasons to that effect"*⁷.

In your confirmatory application, you indicate that you are *not requesting personal data such as email addresses etc, but [that you] do request information that relates to Commission actions and deliberations.*

⁶ Case C 28/08 P Commission v Bavarian Lager [2010], EU:C:2010:378, para. 63.

⁷ Judgment of the Court of 15.07.2015 in Case T-115/13, Dennekamp v. Parliament.

As already mentioned, you claim that *without transparency on these matters it is impossible for third parties to conduct a full assessment of whether the Code of Conduct for Commissioners is being effectively and consistently applied and implemented.*

You then consider that *"it would be semantics for the Commission to argue that no formal decision was made in the case of Ms Hedegarard and Ms Vassiliou as it seems clear that their requests for authorisation of professional activities were only withdrawn once the ad hoc ethical committee opinion had been communicated to them and after intervention by the Secretary General"* and that *"[t]hese were key elements of the Commission's decision making process"*.

Before assessing these reasons invoked for the purpose of demonstrating the necessity of the transfer of personal data, I confirm that the College of Commissioners did not deliberate on the applications withdrawn by the two Commissioners. While there are indeed opinions of the *ad hoc* ethical committee that have been communicated to the former Commissioners, there are no Commission decisions rejecting those applications, as they were withdrawn.

These requests withdrawn prior to the adoption of a decision are considered not to have been lodged. In consequence, no further follow up was given to them by the Commission.

The main reason you invoke for justifying the necessity of the transfer is the need for third parties to conduct the assessment of whether the Code of Conduct for Commissioners is being effectively and consistently applied and implemented.

The procedure put in place by the Code of Conduct aims precisely at identifying post-mandate activities of former Commissioners which could be incompatible with Article 245 TFEU and the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

The Commission has acknowledged, by its initial reply together with the publication of the Commission's minutes, the necessity of transferring certain data concerning former Commissioners in the context of authorised post-mandate activities. The aim is to enable the public to check the implementation of the Code by the College and that the activities which are going to be taken up by the former Commissioners are compatible with the Treaty and thereby guarantee the protection of the public interest and an appropriate level of transparency. This is also the sense of the letter written to Alter-EU in June 2011 by the previous Secretary-General that you cite in your confirmatory application.

If, on the contrary, in the course of the procedure covered by the Code of Conduct, the former Commissioner withdraws his/her application, the College does not have to take a decision and in any case no incompatibility or possible conflict of interest could possibly arise from that situation. The withdrawn application indeed clearly shows that whilst the former Commissioners rightfully, and in accordance with the Code of conduct, notified an envisaged activity, this could not lead to an incompatibility or a possible conflict of interest since the notification was later withdrawn and the offer of the post in question was to be declined.

Concerning such data, I therefore consider that transferring the remaining documents (data related to withdrawn applications) would not be proportionate for attaining your objective of controlling the consistent implementation of the Code by the Commission. Indeed the latter objective can be attained by controlling the decisions taken by the institution without the need to have access to withdrawn applications that will not materialise. I am therefore of the opinion that you have not established the necessity of the transfer.

2.2.2. On the protection of the legitimate interests of the data subjects concerned

Although under these circumstances, it is not necessary to analyse the second cumulative condition for transfer of personal data required by Article 8(b) of Regulation 45/2001, ie. that there is no reason to assume that transferring the withdrawn request of a former Commissioner could prejudice their legitimate interests, I would like to share my views on this. I acknowledge that public figures such as former Commissioner have generally accepted that some of their personal data will be disclosed to the public. A distinction has nevertheless to be drawn between the public and private sphere of such public figures in order to determine the degree of protection of personal data to which they are entitled under Regulation 45/2001.

Concerning withdrawn applications, I consider that, once withdrawn, these applications only reflect initial intentions of the former Commissioners. These personal intentions of former Commissioners who have subsequently changed their mind and could not raise any potential conflict of interest or incompatibility could not possibly violate their duty to behave with integrity and discretion as required by Article 245 TFEU and thus negatively affect the Commission's reputational image.

For that reason, I am of the opinion that they remain entirely within the sphere of the former Commissioner's private life and cannot be released as their release would harm the privacy and integrity of the Commissioners by making known to the public information on intentions of post mandate professional activities not materialised.

Finally, you refer to a former Commission decision on a confirmatory application, comparable in your view, where the Commission released documents relating to a request to carry out post-mandate activities introduced by a former Commissioner.

The case you refer to concerns former Commissioner McCreevy. However, contrary to what you allege, the factual and legal situation was different in that case. Former Commissioner Mr McCreevy's post-mandate activity came into the public domain through press publications concerning the post offered to him, his employer, his employer's declarations to the press and other details relating to his conditions of employment⁸. Although Mr McCreevy withdrew his request after the *ad hoc* Ethical Committee emitted its opinion, the case was publicly known through press releases from his employer and other publications⁹. Under these circumstances, it was considered that disclosure of documents containing personal information which was already publicly known and disclosed by the former Commissioner employer, would not undermine the protection of Mr McCreevy's privacy and integrity.

To the contrary, in the current files, there are no elements that allow the Commission to presume that the personal data or documents concerning the withdrawn requests for post-mandate activities by former Commissioners Ms Vassiliou and Ms Hedegaard have been disclosed to the public. Under these circumstances, the Commission has valid reasons to withhold the respective documents or parts thereof, as you have not put forward any valid reasons to substantiate a need to obtain these personal data, and it can be assumed that public disclosure of the withheld documents or parts thereof would undermine the privacy and integrity of the former Commissioners.

Finally, Article 4(1)(b) of Regulation 1049/2001 does not provide for a possibility for the interests protected to be overridden by a public interest in disclosure.

In view of the above, the Commission has to confirm the decision to refuse access to the withheld documents and part thereof relating to the withdrawn requests for post-mandate activities by former Commissioners Ms Hedegaard and Ms Vassiliou, pursuant to Article 4(1)(b) of Regulation 1049/2001.

2.3. Protection of commercial interests

Article 4(2), first indent of Regulation No. 1049/2001 stipulates that:

The 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.

⁸ See for example: <http://www.irishtimes.com/business/mccreevy-subject-of-european-ethics-inquiry-1.659499>

⁹ <http://www.irishtimes.com/news/mccreevy-resigns-from-bank-board-1.865250>

Several of the documents and parts thereof which were submitted by the former Commissioners in support of the withdrawn applications contain contractual information, including information about the potential employers and conditions of employment offered to the respective Commissioners (documents 1, 7, 10 and 11 in GESTDEM 2015/3715 and documents 3, 5, 10, 12 in GESTDEM 2015/3703). That information has commercial value and disclosure of the requested documents would undermine the commercial interests of the potential employers concerned, as it would disclose their employment strategy and offered conditions of employment.

Therefore, I conclude that no access can be granted to the withheld documents and parts thereof, as the disclosure of the redacted data would undermine the protection of the potential employers' commercial interests.

The exception of Article 4(2), first indent of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure.

Firstly, such an interest must be public and secondly, it must offset the harm caused by releasing the documents concerned. This means that it must override the interest protected by Article 4(2), first indent of Regulation 1049/2001.

You have not substantiated, in your confirmatory application, the existence of any public interest that would override the commercial interests protected by Article 4(2), first indent of Regulation 1049/2001. Nor have I been able, based on the elements at my disposal, to identify such an interest.

I therefore consider that in this case, the public interest is better served by keeping withheld (parts of the) documents containing contractual information covered by the exception of Article 4(2), first indent of Regulation 1049/2001.

As explained above, Article 4(1)(b) does not provide for a possibility for the interests protected to be overridden by a public interest in disclosure.

3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the withheld documents or wider partial access for the withheld parts. However, for the reasons explained above, no meaningful (wider) partial access is possible without undermining the protection of the privacy and integrity of the individual or the protection of commercial interests, as described above.

Consequently, I come to the conclusion that no meaningful partial access can be granted to the withheld (parts of the documents).

4. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

A handwritten signature in black ink, consisting of a horizontal line with a loop and a vertical stroke crossing it.

Alexander Italianer