



EUROPEAN COMMISSION

Brussels, 29.8.2016  
C(2016) 5608 final

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**DECISION OF THE SECRETARY-GENERAL IN ACCORDANCE WITH ARTICLE 4 OF THE  
IMPLEMENTING PROVISIONS OF REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory applications for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2016/3147**

Dear Ms Beeley,

I refer to your e-mail dated 19 July 2016, registered on 28 July 2016, 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 1049/2001').

**1. SCOPE OF YOUR APPLICATION**

In your initial application of 7 June 2016, you requested access to *all documents appertaining to EU funding, training and correspondence with or about the Syria White Helmets*.

Through its initial reply dated 19 June 2016, the Directorate-General for European Civil Protection and Humanitarian Aid Operations (hereafter 'ECHO') identified one document as falling under the scope of your request, namely grant agreement ECHO/SYR/BUD/2015/91057 consisting in an interim report submitted by the humanitarian non-governmental organisation (hereafter 'NGO').

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

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

After consultation of the third party in question in accordance with Article 4(4) of Regulation 1049/2001, who marked its opposition to disclosure of this document, ECHO refused access to it, based on the exceptions of Article 4 of Regulation 1049/2001.

It explained that its release would pose security and safety risks to the third party's staff and the staff of the implementing partner.

Through your confirmatory application, you request a review of ECHO's position.

## **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 a fresh review of the reply given by the service concerned at the initial stage in light of the provisions of Regulation 1049/2001.

Having examined your confirmatory application, I would like to inform you that the decision of ECHO to refuse access to the document in question has to be confirmed on the basis of Article 4(1)(a), first indent (protection of the public interest as regards public security), Article 4(2), first indent (protection of commercial interests of a natural or legal person) and Article 4(1)(b) (protection of the privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out below.

### **2.1. Protection of the public interest as regards public security**

Article 4(1)(a), first indent of Regulation 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.*

The requested document is an interim report submitted by the NGO with regard to the humanitarian project it is conducting in Syria. This document analyses the issues at stake, reports on and proposes concrete actions, and contains descriptions of partners and their working methods as well as budget projections. It is a global report on the project in question, where a reference to the Syrian Civil Defence ('Syria White Helmets') is made in only one paragraph.

With regard to descriptions of partners, their working methods as well as concrete actions, which allow to locate precisely staff and areas of intervention, this constitutes confidential and sensitive information, whose disclosure would pose an important security risk, particularly in Syria, to the NGO's and implementing partner's staff as well as to the whole operation in general. Given the complex nature of programming in Syria and the important daily operational and security challenges implementing partners face, all detailed information regarding them, including the locations they work on and the staff they employ, must remain confidential in order to ensure the safety of implementing staff as well as the effectiveness of humanitarian aid operations in Syria.

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), first indent of Regulation 1049/2001 (protection of the public interest as regards public

security) is justified, and that access to the document in question must be refused on that basis.

## **2.2. Protection of commercial interests**

Article 4(2), first indent of Regulation 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.*

As explained under point 2.1, the requested interim report analyses the issues at stake, reports on and proposes concrete actions and contains budget projections. The disclosure of this sensitive and confidential information would undermine the protection of the commercial interests of the NGO. Public disclosure of the document in question would indeed deprive the NGO of its ability to exercise its humanitarian activities in Syria effectively.

The Commission cannot elaborate any further on the underlying justification without revealing the contents of the sensitive commercial information contained in the document and without thereby depriving the applicable exception for the protection of commercial interests of its very purpose.

Having regard to the above, I consider that the use of the exception under Article 4(2), first indent of Regulation 1049/2001 (protection of commercial interests) is justified, and that access to the document in question must be refused on that basis.

## **2.3. Protection of privacy and the integrity of the individual**

Article 4(1)(b) of Regulation 1049/2001 provides that *the 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.*

The document requested contains personal data, such as names, e-mail addresses and telephone numbers of NGO staff.

In this respect, 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.*

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001<sup>3</sup> (hereafter 'Data Protection Regulation') becomes fully applicable<sup>4</sup>.

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<sup>3</sup> 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

Article 2(a) of the Data Protection Regulation provides that '*personal data*' shall mean any information relating to an identified or identifiable person [...]. According to the Court of Justice, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life"*<sup>5</sup>. The names<sup>6</sup> of the persons concerned as well as other data such as e-mail addresses and telephone numbers, from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation. It follows that public disclosure of the above-mentioned data would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

Pursuant to Article 8(b) of the Data Protection Regulation, the Commission can only transmit personal data to a recipient subject to Directive 95/46/EC 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. Those two conditions are cumulative. Only fulfilment of both conditions, and the lawfulness of processing as required by Article 5 of Regulation 45/2001, enables one to consider the processing (transfer) of personal data as compliant with the requirement of Regulation 45/2001.

In the recent judgment in the *ClientEarth* case, the Court of Justice ruled that *whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access*<sup>7</sup>. I refer also to the *Strack* case, where 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>8</sup>.

In your confirmatory request, you do not establish the necessity of having the data in question transferred to you. Your confirmatory application does indeed not contain any considerations establishing that, in order to attain the objectives for the purposes of which you are requesting disclosure of the document in question, it is necessary to obtain disclosure of these personal data<sup>9</sup>.

According to constant case-law, if an applicant has not established the necessity of having the data transferred, the institution does not have to examine the absence of prejudice to the data subject's legitimate interests<sup>10</sup>.

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institutions and bodies and on the free movement of such data, Official Journal L 8 of 12 January 2001, page 1.

<sup>4</sup> Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08P, EU:C:2010:378, paragraph 63.

<sup>5</sup> Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>6</sup> Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

<sup>7</sup> Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

<sup>8</sup> Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

<sup>9</sup> Judgment of 23 November 2011, *Dennekamp v Parliament*, T-82/09, EU:T:2011:688, paragraph 34.

<sup>10</sup> Judgment in *Strack v Commission*, cited above, EU:C:2014:2250, paragraphs 107 to 110.

On a subsidiary basis, I consider, however, that there is also no reason to think that the legitimate rights of the individuals concerned would not be prejudiced by the transfer of their personal data.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

Therefore, I have to conclude that the transfer of the personal data in question cannot be considered as fulfilling the requirements of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

### **3. NO PARTIAL ACCESS**

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation 1049/2001. However, it follows from the assessment made above under points 2.1 and 2.2, that the document which falls within the scope of your request is manifestly and entirely covered by the exceptions laid down in Article 4(1)(a), first indent and Article 4(2), first indent of Regulation 1049/2001.

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

The exceptions laid down in Article 4(2) must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you do not invoke any such overriding public interest. Nor have I been able, based on the elements at my disposal, to establish the existence of any possible overriding public interest in disclosure of the requested document. In consequence, I consider that in this case there is no overriding public interest that would outweigh the interest in safeguarding the protection of Article 4(2), first indent of Regulation 1049/2001 (protection of commercial interests).

The fact that the document relates to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness, provides further support to this conclusion.

Please also note that the exceptions laid down in Article 4(1) of Regulation 1049/2001 are absolute exceptions which do not require the institution to balance the exception defined therein against a possible public interest in disclosure.

## 5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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  
Alexander ITALIANER  
Secretary-General*