



EUROPEAN COMMISSION

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C(2017) 2919 final

Mr Jesús ESCUDERO

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ANNULS AND REPLACES C(2017)2196 final

**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 application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2016/5992**

Dear Mr Escudero,

I refer to your e-mail of 22 December 2016, registered on the following day, 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 ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 25 October 2016, you requested access to *all correspondence (including letters, emails, phonelogs, minutes of meetings...) between the President of the European Commission Jean-Claude Juncker or his Cabinet since November 1st 2014 with:*

- *Spanish Prime Minister Mariano Rajoy or his Cabinet.*

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

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

- *Spanish Deputy Prime Minister Soraya Sáenz de Santamaría or her Cabinet.*
- *Spanish Minister of Economy Luis de Guindos or his Cabinet.*

At initial level, Directorate D Policy Coordination I informed you that it had identified 15 documents falling within the scope of your request. It:

- granted full access to one document and wide partial access to documents 1 to 6, 8 to 10 and 12 to 15, subject to redaction of personal data only, in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001;
- refused access to documents 7 and 11 on the basis of Article 4(1)(a), fourth indent (protection of the financial, monetary or economic policy of the Union or a Member State) of Regulation 1049/2001.

By your confirmatory application you contest the initial decision of 19 December 2016 not to grant access to documents 7 and 11. These documents are the following:

- Letter of 26 February 2016 addressed by Mr Rajoy Brey to Mr Juncker and one annex Ares(2016)1007386 (Document 7);
- Letter of 5 May 2016 addressed by Mr Rajoy Brey to Mr Juncker Ares(2016)2163483 (Document 11).

You further indicate that you request access not only to the correspondence of the above-mentioned persons but also to the correspondence of their Cabinets. You emphasise that you request *all correspondence between the President of the European Commission Jean Claude Juncker or his Cabinet with Spanish Prier Minister Mariano Rajoy or his Cabinet, Spanish Deputy Prime Minister Soraya Sáenz de Santamaría or her Cabinet and Spanish Minister of Economy Luis de Guindos or his Cabinet.* You request explanations why such correspondence has not been identified.

Finally, you indicate that document 14³ mentions two enclosures, namely *a leaflet with an overview of the progress made by the EFSI so far and a summary of the EFSI investments in Spain.* You indicate that these enclosures were not transmitted to you.

You underpin your confirmatory application with several arguments which I will address in detail below.

³ Letter of 27 September 2016 addressed by Mr Juncker to Mr Rajoy Ares(2016)5585462.

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 provided by the relevant service at the initial stage.

As part of its review and following the clarification, in your confirmatory application, of the scope of your request, the Secretariat-General conducted a new search for additional documents which could fall within that scope.

Following that search, I am pleased to inform you that full access is granted to the following two enclosures to document 14 which were omitted in the initial decision due to a clerical error:

- A leaflet with an overview of the progress made by the EFSI (*Plan de inversiones para Europa*), Ares(2016)5585462 (enclosure 1);
- A summary of the EFSI investments in Spain, Ares(2016)5585462 (enclosure 2).

As regards the identification of documents, I confirm that the Commission does not hold any additional document, other than the documents already identified at initial stage, which falls within the scope of your request.

2.1. Consultation of the Spanish authorities

Documents 7 and 11 originate from the Spanish authorities. According to Article 4(4) of Regulation 1049/2001, *as 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*. According to Article 4(5) of Regulation 1049/2001, *a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement*.

Under the provisions of Article 4(4) and (5) of Regulation 1049/2001 and with a view to taking into account the arguments put forward in your confirmatory application, a renewed third-party consultation of the Spanish authorities was initiated by the Secretariat-General at confirmatory stage.

On 30 March 2017, after we sent you our confirmatory decision (Commission Decision C(2017)2196 final), the Spanish authorities withdrew their opposition to the disclosure of the requested documents. They agreed to their full disclosure, subject only to the redaction of personal data. In order to take into account this agreement, Commission Decision C(2017)2196 final is annulled and replaced by this decision.

Given the agreement of the Spanish authorities, wide partial access is granted to the requested documents, subject only to redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001 (enclosures 3-5).

The detailed reasons are set out below.

2.2. Protection of privacy and integrity

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* case⁴, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001⁵ (hereinafter the 'Data Protection Regulation') becomes fully applicable. In this judgment the Court stated that Article 4(1)(b) *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 Regulation No 45/2001*⁶.

Article 2(a) of 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*)⁷, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life.*

The letter of 26 February 2016 (part of Document 7) and Document 11 contain the handwritten signature of Mr Rajoy Brey, which is biometric data to be considered as personal data in the sense of Article 2(a) of Data Protection Regulation 45/2001.

Pursuant to Article 8(b) of Regulation 45/2001, 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.⁸

Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

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

⁴ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd.*, Case C-28/08P, EU:C:2010:378, paragraph 59.

⁵ 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.

⁶ Paragraph 59.

⁷ 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*, EU:C:2003:294, paragraph 73.

⁸ Judgment of the Court of Justice of 29 June 2010, *Bavarian Lager*, quoted above, paragraphs 77-78.

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 access⁹.

In your confirmatory application, you do not put forward any arguments to establish the necessity of, nor any interest in access to the personal data contained in Documents 7 (transmission letter) and Document 11.

Furthermore, there are reasons to assume that the legitimate interests of the individual concerned would be prejudiced by disclosure of the personal data included in this document, as there is a real and non-hypothetical risk that such public disclosure would expose it to specific risks, for example forgery of its signature or identity theft.

Consequently, pursuant to Article 4(1)(b) of Regulation 1049/2001, access is refused to the signature of Mr Rajoy Brey included in Documents 7 (transmission letter) and Document 11.

I would also like to point out that Article 4(1)(b) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

3. MEANS OF REDRESS

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*

Enclosures (5)

⁹ Case C-615/13P, Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA*, EU:C:2015:489, paragraph 47.