



EUROPEAN COMMISSION

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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 application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2017/444**

Dear Mr Schindler,

I refer to your e-mail of 16 February 2017, registered on 17 February 2017, 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 (hereafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR APPLICATION

In your initial request of 25 January 2017, you requested access to:

... all information (including emails, drafts, memos, notes, recordings, tables, files, etc)

a) by,

b) to OR

*c) from Günther Oettinger, Michael Hager and the person whose name is
redacted [from document ARES(2016)7049904]*

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

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

*that relates to the Hamburg event. The temporal scope of these requests should contain both the time before as well as after the event*³.

You further request *a copy of the data on the USB drive that was sent to Commissioner Oettinger*⁴ *by the AGA*⁵.

The Commission's Directorate-General for Communications Networks, Content and Technology (hereafter 'DG CNECT') have not provided you with a reply within the deadlines set out in Regulation 1049/2001. You have, therefore, submitted a confirmatory application.

I understand that your request for access is a follow-up of your request GESTDEM 2016/6031 and the Commission's confirmatory decision sent to you on 25 January 2017.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

Following your confirmatory application, the Commission carried out a thorough search for documents falling under the scope of your request. Based on this search, the Commission identified two documents, namely:

- (1) An invitation letter of 8 July 2016 the AGA addressed to Commissioner Oettinger regarding his participation in EuropaAbend (ref. Ares(2016)3978692); and
- (2) a letter of 17 February 2017 the AGA addressed to Commissioner Oettinger together with an enclosed AGA report (ref. Ares(2017)1193738).

I am pleased to inform you that wide partial access is granted to the above-mentioned documents, subject only to the redaction of personal data, based on the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual), as explained below.

Concerning your specific request for any correspondence between the organisers of the event and the person whose name was redacted from document ARES(2016)7049904, I would like to clarify that the person in question performs secretarial functions and the exchanges she had with the organisers of the event were of a purely logistical nature, such as regards the organisational issues pertaining to the event. In line with the Commission document management rules, such types of correspondence are considered unimportant and short-lived, do not meet the registration criteria and are therefore not stored in any of the Commission's document-management systems. Consequently, such short-lived messages cannot be retrieved and assessed in the context of access-to-documents requests.

³ EuropaAbend, organised on 27 October 2016 in Hamburg.

⁴ As mentioned in document ARES(2016)7049904, provided to you in the context of your request for access Gestdem 2016/6031.

⁵ AGA Norddeutscher Unternehmensverband Großhandel, Außenhandel, Dienstleistung e. V

Concerning your request for the content of the memory stick sent by AGA, I regret to inform you that the memory stick does not contain any data. Following your request, the memory stick in question was sent for analysis to the Commission's Directorate-General for Informatics (DIGIT). The findings by DIGIT were that no files have ever been saved on the memory stick in question.

Justifications for the redaction of personal data

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 two documents in question contain personal name, emails, direct telephone lines and biometric data, such as handwritten signatures.

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. 45/2001⁶ (hereafter 'Data Protection Regulation') becomes fully applicable⁷.

Article 2(a) of the Data Protection Regulation provides that '*personal data*' shall mean *any information relating to an identified or identifiable person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.* 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"*⁸.

The name of a person who is not the main legal representative of the entity in question, personal emails and direct telephone lines, as well as biometric data, such as handwritten signatures contained in the documents in question, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

⁶ 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 January 2001, page 1.

⁷ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08P, EU:C:2010:378, paragraph 63.

⁸ 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.

Public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients 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.⁹

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 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*¹⁰. 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 data¹¹.

In your initial request, you do not establish the necessity of having the data in question transferred to you. Therefore, I have to conclude that the transfer of personal data through its disclosure cannot be considered as fulfilling the requirements of Regulation 45/2001.

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, 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.

For the sake of completeness, I would like to point out that the names of high-level politicians who are public figures were not redacted from document 1¹². Likewise, the name of the official legal representative of AGA is disclosed in the two documents in question and is also publicly available on-line.

⁹ Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraphs 77-78.

¹⁰ Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

¹¹ Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

¹² The names and photos of these politicians are also available on the website of the event: www.europaabend.de

Finally, the enclosure to document 2, which is the AGA annual report for 2016 has been made publicly available on the Internet by AGA¹³, therefore no redactions of personal data have been made there either.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

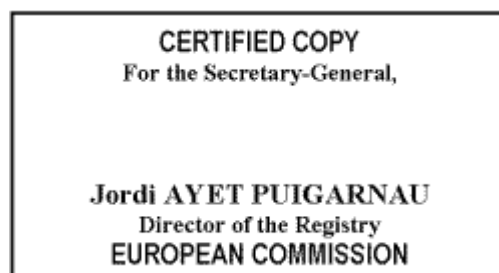
Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure.

4. 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*



Annexes (2)

¹³ See: <http://leistungsbilanz.aga.de/2017>