EUROPEAN COMMISSION

Brussels, 25.6.2018
C(2018) 4115 final

Mr Olivier HOEDEMAN
Corporate Europe Observatory
Rue d'Edimbourg 26
1050 Brussels

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/1205**

Dear Mr Hoedeman,

I refer to your letter of 8 May 2018, registered on 15 May 2018, wherein 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 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 5 February 2018, addressed to the Secretariat-General and handled by Directorate E ('Policy Co-ordination II') of the Secretariat-General, you requested access to the following documents:

- 'all reports (and other notes) from meetings between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc., as well as organisations and individuals that work to further the interests of the tobacco industry), since [1] January […] 2017;

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.

- all correspondence (including emails) between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc. as well as organisations and individuals that work to further the interests of the tobacco industry), since [1] January […] 2017;

- a list of all the above-mentioned documents (including dates, names of participants/senders/recipients and their affiliation, subject of meeting/correspondence)'.

The European Commission has identified 27 documents as falling under the scope of your request. They are listed in the annex to this decision.

In its initial reply of 13 April 2018, Directorate E of the Secretariat-General partially 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 1049/2001.

Through your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

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.

Following this review, I am pleased to inform you that:

– one document to which you request access (document 3) is publicly available online[3],

– full access is granted to two further documents (documents 5 and 12); and

– further partial access is granted to 22 documents (documents 2, 4, 6, 8-11 and 13-27).

As regards the remaining redacted parts of documents 2, 4, 6, 8-11 and 13-27, I regret to inform you that I have to confirm the initial decision of Directorate E of the Secretariat-General to refuse access. Access is refused to those parts pursuant to the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out below.

Finally, I note that two documents (i.e. documents 1 and 7) have already been disclosed in their entirety at the initial stage (and not only partially as indicated in the initial reply), as they do not contain any personal data.

[3] Publicly available on the website of one of the respective stakeholders: https://www.clivebates.com/documents/TimmermansSnusJune2017.pdf.

Article 4(1)(b) of Regulation 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 accordance with the *Bavarian Lager* ruling[4], when a request is made for access to documents containing personal data, Regulation 45/2001[5] becomes fully applicable. Article 2(a) of Regulation 45/2001 defines personal data as 'any information relating to an identified or identifiable natural person'.

In its *Nowak* judgment[6], the Court of Justice stated that the use of the expression 'any information' in the definition of the concept of 'personal data' reflects the aim of the EU legislature to assign a wide scope to that concept. It clarified that that concept is not restricted to information that is sensitive or private, but 'potentially encompasses all kinds of information, not only objective but also subjective […], provided that it "relates" to the data subject'.

The Court of Justice also clarified that, for information to be treated as 'personal data', 'there is no requirement that all the information enabling the identification of the data subject must be in the hands of one person'[7].

In this instance, documents 2, 4, 6, 8-11 and 13-27 contain information related to identified or identifiable individuals that needs to be protected. In particular, they contain the names, functions and contact data of the non-senior European Commission staff or the non-senior staff of the interest representatives. The documents also contain the contact data and handwriting (including signatures) of senior European Commission staff or senior staff of the interest representatives.

Pursuant to settled case law, the concept of 'private life' must not be interpreted restrictively and there is no reason of principle to justify excluding activities of a professional nature from the notion of 'private life'[8].

The above-mentioned information relating to individuals and other information from which their identity can be deduced clearly constitutes personal data within the meaning of Article 2(a) of Regulation 45/2001. Their public disclosure would therefore constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

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

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, p. 1) – hereinafter referred to as 'Regulation 45/2001'.

6 Judgment of 20 December 2017, *Nowak v Data Protection Commissioner*, C-434/16, EU:C:2017:994, paragraphs 34-35.

7 Idem, paragraph 31.

8 See, amongst others, judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk*, C-465/00, EU:C:2003:294, paragraph 73.

Pursuant to Article 8(b) of Regulation 45/2001, personal data shall only be transferred to recipients if they establish 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], and only the fulfilment of both conditions and the lawfulness of processing in accordance with the requirements of Article 5 of Regulation 45/2001 enables one to consider the processing (transfer) of personal data as compliant with the requirements of Regulation 45/2001.

In its *ClientEarth* judgment, the Court of Justice ruled that the institution does not have to examine, of its own motion, the existence of a need for transferring personal data. It also stated that if the applicant has not established a need to obtain the personal data requested, the institution does not have to examine the absence of prejudice to the person's legitimate interests[10].

In that context, 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 whether there is 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[11].

In the above-mentioned *Bavarian Lager* ruling, the Court of Justice clarified that the necessity of transfer must be demonstrated by express and legitimate justifications or convincing arguments[12].

In your confirmatory application, you argue that '[t]he names of professional lobbyists and the organisations and companies they work for are not personal data'. You stress that this information should be accessible to the public 'to enable scrutiny of who is influencing EU decision-making'. In your view, there is 'a clear public interest and this is what constitutes the necessity of having the redacted data transferred'. You claim that there is 'no reason at all to assume that the legitimate rights of the persons concerned might be prejudiced by disclosure of the names of professional lobbyists and the organisations and companies they work for'.

As explained above, wider access is given to most of the documents requested, including the names of organisations and companies of the tobacco industry. As regards the remaining redacted parts of the documents, which are exclusively personal data, I consider that your considerations are of a general and abstract nature, and that you do not support them with any evidence.

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9 Judgment in *Commission* v *Bavarian Lager*, cited above, paragraphs 77-78.

10 Judgment of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraphs 47-48.

11 Judgment in *Commission v Bavarian Lager*, cited above, paragraphs 77-78; judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 107-108; and also judgment of 9 November 2010, *Schecke and Eifert v Land Hessen*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 85.

12 Judgment in *Commission* v *Bavarian Lager*, cited above, paragraph 78.

Indeed, the Court of Justice held, in its *ClientEarth* ruling, that a general reference to 'transparency' is not sufficient to substantiate a need to obtain personal data, as 'no automatic priority can be conferred on the objective of transparency over the right to protection of personal data'[13].

In this respect, the Court of Justice has confirmed, in its *Strack* judgment, that a mere interest of members of the public in obtaining certain personal data cannot be equated with a necessity to obtain the said data in the meaning of Regulation 45/2001[14].

In accordance with the *Dennekamp* judgment, the mandatory application of Article 8(b) of Regulation 45/2001 results in the applicant being required to prove that the measure concerned is proportionate and the most appropriate means of attaining the aim pursued[15].

You do not indicate either in your initial or confirmatory application, why the disclosure of all personal data contained in the documents would be the most appropriate and proportionate of measures for attaining your objective.

Against this background, I consider that you have not provided sufficient arguments and/or justifications that would show in what respect the processing (i.e. transfer) of the redacted personal data was necessary to satisfy a public (and not a private) interest. Consequently, your arguments do not substantiate the necessity of transferring the respective personal data.

Therefore, the redacted personal data in the respective documents may not be disclosed as the need for public disclosure of that personal data has not been substantiated, and there is reason to assume that the data subjects' legitimate interests might be prejudiced.

In light of this, I must conclude that the transfer of personal data contained in the documents requested cannot be considered as fulfilling the requirement of Regulation 45/2001 and that such a transfer is consequently also prohibited under Article 4(1)(b) of Regulation 1049/2001.

Finally, I would like to draw your attention to the fact that Article 4(1)(b) of Regulation 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

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13 Judgment in *ClientEarth v European Food Safety Authority*, cited above, paragraph 51.
14 Judgment in *Strack v Commission*, cited above, paragraphs 107 and 108.
15 Judgment of 15 July 2015, *Dennekamp v European Parliament*, T-115/13, EU:T:2015:497, paragraphs 59 and 60.

3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting further partial access to the documents requested.

As explained above, one document is already in the public domain, full access has been provided to four documents and wider partial access has been provided to 22 documents. As regards the remaining redacted parts of the documents, for the reasons explained above, no meaningful further partial access is possible without undermining the interests described above.

Consequently, I conclude that the redacted parts of the documents requested are covered in their entirety by the invoked exception to the right of public access.

4. 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,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Martin SELMAYR
Secretary-General

Enclosures: Annex (List of documents) and 24 documents