



EUROPEAN COMMISSION

Brussels, 22.7.2019
C(2019) 5593 final

Ms Laura Kayali
POLITICO
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Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/1323 and
2019/1387**

Dear Ms Kayali,

I refer to your email of 3 May 2019, registered on the same 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 (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 7 March 2019, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to:

- ‘List of lobby meetings held with Internal Market, Industry, Entrepreneurship and SMEs with Amazon or its intermediaries. The list should include: date, individuals attending and organisational affiliation, the issues discussed;
- Minutes and other reports of these meetings;
- All correspondence including attachments (i.e. any emails, correspondence or telephone call notes) between [the Directorate-General for Internal Market,

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

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

Industry, Entrepreneurship and SMEs] (including the Commissioner and the Cabinet) and Amazon or any intermediaries representing its interests;

- All documents prepared for the meetings and exchanged in the course of the meetings between both parties’.

This request, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs was registered under the reference number GESTDEM 2019/1387. Your same request addressed to the Directorate-General for Employment, Social affairs and Inclusion was registered under the reference number GESTDEM 2019/1323. Both requests were handled by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs in a single reply.

These documents should cover the period between November 2014 and March 2019.

Since you made 25 simultaneous requests for access to documents concerning several Directorates-General of the European Commission and Amazon, Google, Microsoft or Facebook, the Secretariat-General sent you a fair solution proposal on 26 March 2019.

On 2 April 2019, you replied to the proposal by agreeing to limit the intermediaries of Amazon to law firms and/or consultants directly representing Amazon in meetings.

As a preliminary remark, I would like to clarify that the term ‘lobby meeting’ is defined in Article 2 the Commission Decision of 25 November 2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals (2014/838/EU, Euratom)³ and Commission Decision of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals (2014/839/EU, Euratom)⁴.

Based on the above, the European Commission has identified the following documents as falling under the scope of your request:

- Email of 17 December 2014 addressed to Commissioner Bieńkowska, which includes as annex a letter of meeting request, reference Ares(2014)425086 (hereafter ‘document 1’);
- Exchange of emails of 29 June 2015 addressed to the Cabinet of Commissioner Bieńkowska, reference Ares(2019)2897190 (hereafter ‘document 2’);
- Email of 25 May 2016 addressed to the Cabinet of Commissioner Bieńkowska, reference Ares(2016)2503476 (hereafter ‘document 3’);

³ Official Journal L 343 of 28.11.2004, p. 19.

⁴ Official Journal L 343 of 28.11.2004, p. 22.

- Exchange of emails of 25 May, 13 June and 8 August 2016 addressed to Commissioner Bieńkowska, which includes as annex a letter of meeting request, reference Ares(2016)4204690 (hereafter ‘document 4’);
- Exchange of emails of 22 August and 8 September 2016 addressed to Commissioner Bieńkowska, reference Ares(2016)4204690 (hereafter ‘document 5’);
- Email of 10 April 2017 addressed to the Cabinet of Commissioner Bieńkowska, reference Ares(2017)2119964 (hereafter ‘document 6’);
- Email of 24 May 2017 addressed to the Cabinet of Commissioner Bieńkowska, reference Ares(2017)2640756 (hereafter ‘document 7’);
- Email of 6 December 2017 addressed to the Cabinet of Commissioner Bieńkowska, which includes as annex a letter of meeting request and a Curriculum Vitae, and a reply to Amazon of 12 December 2017, reference Ares(2017)5990282 (hereafter ‘document 8’);
- Email of 4 June 2018 addressed to the Cabinet of Commissioner Bieńkowska and a reply to Amazon of 20 June 2018, reference Ares(2018)2904802 (hereafter ‘document 9’);
- Email of 18 June 2018 addressed to the Cabinet of Commissioner Bieńkowska, which includes as annex a letter of meeting request, reference Ares(2018)3213950 (hereafter ‘document 10’);
- Email of 31 October 2018 addressed to the Cabinet of Commissioner Bieńkowska, reference Ares(2018)5575824 (hereafter ‘document 11’);
- Email of 5 November 2018 addressed to Commissioner Bieńkowska, reference Ares(2018)5655155 (hereafter ‘document 12’);

In its initial reply of 30 April 2019, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs granted wide partial access to these documents, subject only to the redaction of personal data, based on the exception of Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you do not contest the redaction of personal data, but you do request a review of the position of the competent Directorate-General as regards the identification of the documents. More specifically, you note that you did not receive all the answers from the Commission, which make it hard to know if the meetings requested did take place; any reports and/or minutes of the meetings that took place; any documents prepared for the purpose of the meetings and/or exchanged during the course of the meetings.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

As part of this review, the European Commission has carried out a renewed, thorough search for possible documents falling under the scope of your request.

Based on this renewed search, the European Commission has identified the following documents:

- briefing for Commissioner Bieńkowska for the meeting of 13 October 2016, reference Ares(2019)3452300 (hereafter ‘document 13’);
- briefing for the deputy Head of Cabinet of Commissioner Bieńkowska for the meeting of 23 November 2017, reference Ares(2019)3452238 (hereafter ‘document 14’);

Following this review, I can inform you that partial access is granted to documents 13 and 14 based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) and, as regards document 13, Article 4(3), first subparagraph (protection of on-going decision-making process), of Regulation (EC) No 1049/2001 for the reasons set out below.

Concerning the remaining documents to which you refer in your confirmatory application, I confirm that the Commission does not hold any other documents than the ones identified. According to Article 2(3) of Regulation (EC) No 1049/2001, the right of access applies only to existing documents in the possession of the institution.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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 its judgment in Case C-28/08 P (*Bavarian Lager*)⁵, the Court of Justice ruled that when a request is made for access to documents containing personal data, 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 data⁶ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

⁵ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

⁶ Official Journal L 8 of 12.1.2001, page 1.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁷ (hereafter ‘Regulation (EU) 2018/1725’).

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘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 [...] [the Data Protection] Regulation’.⁸

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’.⁹

Documents 13 and 14 contain personal data such as the names and telephone numbers of persons who do not form part of the senior management of the European Commission as well as names and curriculum vitae of representatives of third parties.

The names¹⁰ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

⁷ Official Journal L 205 of 21.11.2018, p. 39.

⁸ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁹ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁰ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data.¹¹ This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.2. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 provides that '[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

Document 13 is an internal briefing prepared by non-senior Commission staff for the attention of Commissioner Bieńkowska in view of one of the meetings mentioned in your request.

The withheld parts of the document concern a limited number of sensitive views expressed by the Commission services related to matters on which the Commission has not taken a decision yet, such as new initiatives or revisions of existing legislative acts

¹¹ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

and their future aims. These issues are sensitive because they relate to the regulatory environment for the provision of digital services in Europe and its possible update.

Disclosure of the redacted parts of the documents at the preliminary stage of the elaboration of those new initiatives would seriously undermine the protection of the decision-making process of the European Commission regarding ongoing reflexions on some of the pieces of legislation mentioned in the document. It would reveal internal considerations of a strategic nature that would reduce the margin of manoeuvre of the Commission.

Indeed, the Commission has an obligation to protect the soundness of its decision-making processes from undue influence, so as to ensure that, '[i]n carrying out its responsibilities, the Commission shall be completely independent', according to Article 17(3) of the Treaty on the Functioning of the European Union. In this sense, it is important for the quality of the Commission's decision-making process that documents drawn up for internal use are protected, so as to ensure an adequate analysis and discussion within the Commission services. The withheld part of the document concern possible defensive points for important sensitive questions such as the liability regime concerning illegal content and how this could be regulated in the future, possible new rules of intellectual property enforcement in e-Commerce, an approach to designing new measures that identify and disrupt the money trail for commercial scale intellectual property infringing activities.

There is a concrete risk that disclosing, at this stage, opinions on possible revision of the current legal framework, before the Commission has had the opportunity to take position, would seriously undermine the Commission's decision-making process as it would expose it to external pressure. The fact that the withheld parts of the document concern problems and possible solutions reinforces the conclusion that organised interests would exercise external pressure.

In light of the above, the relevant undisclosed parts of document 13 should be protected in accordance with Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(3) of Regulation (EC) No 1049/2001 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 put forward any reasoning pointing to an overriding public interest in disclosing the documents requested.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by in Article 4 (3) of Regulation (EC) No 1049/2001.

Please note that 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

For the reasons explained above, partial access is now granted to the requested documents without undermining the interests described above.

5. 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,



For the Commission
Martin SELMAYR
Secretary-General

Enclosures: (2)