



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 23 May 2019

By email

Ms Marta Moretti
Corso di Porta Nuova, 11
Milan 20121
Italy

ask+request-6666-
lad756a6@asktheeu.org

Subject: Request for access to documents

Ref.: Your request of 29 March 2019 registered under reference GestDem 2019/1958.

Dear Ms Moretti,

I refer to your request for access to documents, under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹. Your request concerns the legal submissions filed by the European Commission and other parties in Case C-557/16².

1. WRITTEN OBSERVATIONS SUBMITTED BY THE EUROPEAN COMMISSION

With regards to the observations submitted by the European Commission, after a concrete assessment of the requested document, I am pleased to inform you that access can be granted. Accordingly, please find attached the Commission's written observations in the available languages, i.e. Finnish and French³.

You may reuse the disclosed document free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the document. Please note that the Commission does not assume liability stemming from the reuse.

2. WRITTEN OBSERVATIONS SUBMITTED BY OTHER PARTIES

With regards to the written observations submitted by other parties to the court proceedings, the Court of Justice has notified to the European Commission the submissions lodged by the following parties:

1. Astellas Pharma GmbH,
2. Helm AG,
3. the Finnish Government,

¹ OJ L 145, 31.05.2001, page 43.

² Judgment of the Court of Justice of 14 March 2018 in *Astellas Pharma*, C-557/16, ECLI:EU:C:2018:181.

³ Finnish was the language of the proceedings, while a French translation was prepared by the Commission's services.

4. the Belgian Government,
5. the German Government,
6. the Irish Government,
7. the Government of the United Kingdom and
8. the Norwegian Government.

The Legal Service has consulted the authors of the documents on their disclosure in accordance with Article 4(4) of Regulation (EC) No 1049/2001.

Following these consultations, I would like to inform you that:

- The Belgian, German, Irish and Norwegian Governments have agreed to the disclosure of their documents.
- Astellas Pharma GmbH, Helm AG, the Government of the United Kingdom and the Finnish Government have not replied to the Commission's consultation.

Regarding the written observations submitted by the parties which have not replied to the Commission's consultation, I would like to inform you that access can be granted in accordance with Regulation (EC) No 1049/2001. The Court of Justice has stated in its *API* judgment⁴ that where court proceedings have been closed by a decision of the Court there are no longer grounds for presuming that disclosure of pleadings lodged with the Court would undermine those proceedings.

Since Case C-557/16 is now closed and in the absence of any objection from the authors of the documents against their disclosure, I conclude that the documents concerned can be disclosed under Regulation (EC) No 1049/2001.

Please note that personal data has been expunged. More specifically, the emails of the agents representing the Governments of the United Kingdom and of Norway, as well as the phone number of the latter and all handwritten signatures have been redacted. Additionally, the name of the Court's official and the initials of the Court's lawyer-linguist in the French translation of the written observations submitted by the Belgian Government, prepared by the Court's services, have also been expunged.

This information constitutes personal data that must be protected under the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 ("*protection of personal data*")⁵ in accordance also with the European Union legislation regarding the protection of personal data.

As the Court of Justice has ruled, when access to documents is requested, the Data Protection Regulation, i.e. Regulation (EU) 2018/1725⁶, becomes fully applicable⁷.

⁴ Judgment of the Court of Justice of 21 September 2010 in Joined Cases *Sweden and Others v API and Commission*, C-514/07P, C-528/07P and C-532/07P, ECLI:EU:C:2010:541, paragraphs 130 and 131.

⁵ "*The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*".

⁶ Regulation 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/EC (OJ L 205 of 21.11.2018, page 39).

⁷ Judgment of the Court of Justice of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, ECLI:EU:C:2010:378, paragraphs 59 and 63. Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data "*means any information relating to an identified or identifiable natural person [...]* ". The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁸

Furthermore, in its judgment in Case C-465/00 the Court has recognised that "*there is no reason of principle to justify excluding activities of a professional nature [...] from the notion of private life*"⁹. On this basis, the personal data concerning the agents representing the Governments constitutes personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725 and has been deleted. Regarding the information relating to the institutions' officials, the General Court has recognised in its judgment of 19 September 2018 that they fall within the notion of "*private life*"¹⁰ regardless of whether this data is registered in the context of a professional activity and, therefore, it also constitutes personal data in the meaning of Article 3(1) of Regulation (EU) No 2018/1725 and must be protected.

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.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established 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 request, 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 subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subject concerned would be prejudiced by 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 initials of the Commission's official, 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 disclosure of the personal data concerned.

⁸ Judgment of the Court of Justice of 20 December 2017, *Peter Nowak v Data Protection Commissioner*, C-434/16, ECLI:EU:C:2017:994, paragraphs 33-35.

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

¹⁰ Judgment of the General Court of 19 September 2018, *Port de Brest v Commission*, T-39/17, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

Accordingly, please find enclosed a copy of the requested observations in the available languages, expunged of personal data.

Please note that the disclosed documents were transmitted by the Court of Justice to the Commission in its capacity as participant to the Court proceedings at stake. Access is granted for information only and cannot be re-used without the agreement of the originator, who holds a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

3. MEANS OF REDRESS

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the following address:

European Commission
Secretary-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 5/82
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

The Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

Yours sincerely,



Luis ROMERO REQUENA

Attachments: 15