




EUROPEAN COMMISSION

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Corporate Europe Observatory
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**DECISION OF THE EUROPEAN 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 2018/3896**

Dear ,

I refer to your email registered on 4 October 2018, 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 19 July 2018, dealt with by the Directorate-General for Health and Food Safety, you requested access to the following documents:

1. 'From the European Commission, excluding DG RTD, any documents between 1 January 2013 and now, including briefings, reports, correspondence (email or other), including all attachments to the said correspondence, exchanged with the European Risk Forum or any body acting on its behalf (such as lobby firm [F]oresight [I]nternational [P]olicy and [R]egulatory [A]dvisers), and that mention or address the "Innovation Principle".'

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

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

You specified that you requested access to ‘the documents in their entirety, including parts that cover other issues’;

2. ‘From the European Commission, excluding DG RTD, a list of all meetings, as well as agendas and minutes or any other reports of such meetings, since 1 January 2013 held with or attended by the European Risk Forum or any body acting on its behalf (such as lobby firm [F]oresight [I]nternational [P]olicy and [R]egulatory [A]dvisers) on any topic.’

Given the wide scope of your application, which falls under the competence of various services of the European Commission, it was split into six separate applications and attributed to the respective Directorates-General³. Each Directorate-General provided a separate reply concerning documents in its possession.

With regard to your application registered under reference number Gestdem 2018/3896, the European Commission has identified the following documents as falling under the scope of your application:

- ‘Back to the office’ report from the meeting with the European Risk Forum of 17 March 2016, reference Ares(2016)2385299 (hereafter ‘document 1’),
- ‘Back to the office’ report from the meeting with the European Risk Forum of 2 May 2018, reference Ares(2018)3706851 (hereafter ‘document 2’),
- Email dated 26 March 2015 from the European Risk Forum to the European Commission concerning ‘Better regulation & Innovation in the EU’, with two attachments, reference Ares(2015)1336994 (hereafter ‘document 3’),
- Agenda of the European Risk Forum meeting on 20 June 2017, concerning ‘Regulation, Innovation and New Technologies’, reference Ares(2017)2869085 (hereafter ‘document 4’),
- Email exchange between the representative of the European Risk Forum and the European Commission, concerning the meeting referred to in document 2, reference Ares(2018)994997 (hereafter: document 5)⁴.

In its reply of 1 October 2018, the Directorate-General for Health and Food Safety granted wide partial access to all of the above-mentioned documents, with the personal data redacted on the basis of the exception protecting the privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001.

In your confirmatory application, you request a review of the initial reply of the Directorate-General for Health and Food Safety.

³ Directorate-General for Health and Food Safety (GestDem 2018/3896), Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (GestDem 2018/4055), Directorate-General for Mobility and Transport (GestDem 2018/4056), Directorate-General for Environment (GestDem 2018/4057), Directorate-General for Informatics (GestDem 2018/4059) and Directorate General for Communication Networks, Content and Technology (Gestdem 2018/4058).

⁴ This document was identified at the confirmatory stage.

In particular, you argue that the withheld personal data included in the documents concerned should not have been redacted, and you provide detailed arguments in this context.

I note that in your confirmatory application you request ‘the full disclosure of the original, un-redacted versions of the documents’. However, the argument that you use in support of this request relates to ‘[t]he names of professional lobbyists and the organisations and companies they work for [...]’. I consider, therefore, that in your confirmatory application, you do not contest the position of the Directorate-General for Health and Food Safety as far as the personal data of the staff members of the European Commission who do not hold any senior management position is concerned.

Additionally, you suggest that the Directorate-General for Health and Food Safety has not identified all documents covered by your request at initial stage. You refer to the ‘back to office report’ from the meeting with the European Risk Forum of 2 May 2018 (document 2) and point out that ‘[...] there are no emails [identified by the European Commission] around the arrangement of this meeting’.

You also contest the completeness of the information included in the above-mentioned document 2.

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 Directorate-General concerned at the initial stage.

Following your confirmatory application, the European Commission has carried out a renewed, thorough search for (additional) documents referred to in your confirmatory application, such as the email messages concerning the meeting arrangements with the European Risk Forum of 2 May 2018. Following this renewed search, the Commission has identified an additional document (‘document 5’).

I can inform you that wide partial access is granted to that document, with personal data redacted on the basis of the exception protecting privacy and the integrity of the individual (Article 4(1)(b) of Regulation 1049/2001).

With regard to the personal data included in documents 1 to 4, to which wide partial access was granted at the initial stage, I wish to inform you that, following my review, I have to confirm the position of the Directorate-General for Health and Food Safety and refuse access to the information redacted in the above-mentioned documents. The underlying exception is the one protecting privacy and the integrity of the individual provided for in Article 4(1)(b) of Regulation 1049/2001.

The issue regarding the completeness of the information in document 2 is addressed in section 5 of this decision.

The detailed reasons are set out below.

2.1 Protection of the privacy and integrity of the individual

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 particular, the relevant undisclosed parts of documents 2, 4 and 5 contain the names, surnames and contact details (email addresses, telephone and office numbers) of staff members of the European Commission who do not hold any senior management position. Documents 1, 3, 4 and 5 also contain the names, surnames and contact details of third party staff members. Additionally, document 5 contains information regarding the professional position (function) of staff members of third parties.

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’.

Indeed, the names of organisations and companies, as such, do not necessarily constitute personal data within the meaning of Article 2(a) of Regulation 45/2001⁵.

However, as the latter Article defines personal data as ‘any information relating to an identified or identifiable natural 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’, the names of the persons concerned, regardless of their affiliation with the above-mentioned organisations and companies, undoubtedly constitute personal data in the meaning of Article 2(a) of the above-mentioned Regulation.

Indeed, the names of individual, natural persons who are staff members of the European Commission or third parties have to be considered as ‘any information relating to an identified or identifiable natural person’. Contact details, such as direct phone numbers or office addresses also fall under the above-mentioned definition as, on the basis of such information, an individual, natural person can be identified.

It follows that the public disclosure of the above-mentioned personal information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling⁶, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable.

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, 12.1.2001, p. 1–22.

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 cumulative⁷.

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

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 that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject⁸.

This has been confirmed by the Court of Justice in the judgment in the *ClientEarth* case⁹. 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 data¹⁰.

In your confirmatory application, you underline that '[t]his is information that should be accessible to the public to enable scrutiny of who is influencing EU decision-making'. You also argue that '[t]here is a clear public interest in having redacted data made public'. According to your confirmatory application, '[t]here 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 a preliminary comment, I would like to point out that the names of the companies or organisations which, as explained above and contrary to what you argue in your confirmatory application, are not considered as personal data, were not redacted from the partially disclosed documents 1 to 5.

Indeed, the organisations and companies represented, for instance during the meeting for which document 4 was prepared, are clearly listed in that document. In the case of the email message included in document 3, the unredacted signatures still enable one to ascertain on behalf of which organisation the email was sent. With regard to the staff members of the European Commission, the names of the organisational entities to which they are affected (units or Directorates-General) were also not redacted¹¹.

⁶ Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.* (ECLI:EU:C:2010:378), paragraph 63.

⁷ Ibid, paragraphs 77-78.

⁸ Ibid.

⁹ Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

¹⁰ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

¹¹ For instance in documents 2 and 4.

With regard to the names, surnames and contact details of the staff members or representatives of third parties or the European Commission, which are personal data, the above-mentioned requirements provided in Article 8(b) of Regulation 45/2001 must be complied with.

In this context, I would like to refer to the *Dennekamp* judgement, according to which, if the condition of necessity laid down by Article 8(b) of Regulation No 45/2001, which is to be interpreted strictly, is to be fulfilled, it must be established that the transfer of personal data is the most appropriate means for attaining the applicant's objective, and that it is proportionate to that objective¹².

The right to the protection of privacy is recognised as one of the fundamental rights in the Charter of Fundamental Rights, as is the transparency of the processes within the institutions of the EU. The legislator did not give either of these two rights primacy over the other, which is confirmed by the *Bavarian Lager* case-law, referred to above.

It has to be recalled that the European Commission has undertaken initiatives aimed at making its decision-making processes more transparent, also from the point of view of the accountability of its staff members. Consequently, the names, surnames and positions of staff members holding senior management positions within the European Commission are not redacted from documents disclosed under Regulation (EC) No 1049/2001. With regard to third parties, the names, surnames and function of their main representatives are also not redacted.

On the other hand, the identities of interlocutors at technical level, who do not hold any senior management position, must be protected, in the view of the European Commission, as their public disclosure would undermine the equilibrium between the fundamental right to privacy and the obligation to ensure the transparency of the decision-making process.

The European Commission has also applied the above-mentioned practice in the case at hand. Indeed, the personal data (names, surnames and functions) of staff members holding senior management positions were also, where applicable, not redacted from the disclosed documents.

In the light of the above, I consider that the transfer of the personal data of staff members of the European Commission and third parties included in documents 1 to 5 would go beyond what is necessary for attaining the objective of ensuring the transparency of the decision-making process, and is therefore disproportionate to that purpose.

I conclude that the transfer of personal data in question through the full disclosure of the above-mentioned documents cannot be considered as fulfilling the requirements of Regulation 45/2001. Consequently, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to disclose publicly the personal

¹² Judgement of the General Court of 15 July 2015 in Case T-115/13, *Dennekamp v European Parliament*, (ECLI:EU:T:2015:497), paragraph 77.

data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. PARTIAL ACCESS

Partial access was granted to documents 1 to 5.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation 1049/2001 does not need to be balanced against any possible overriding public interest in disclosure.

5. ASPECTS FALLING OUTSIDE THE ASSESSMENT UNDER REGULATION 1049/2001

In your confirmatory application, you refer to the information available on the Europa website¹³ and argue that the participants in the meeting held ‘between Commissioner Andriukaitis and representatives of the European Risk Forum’ on 2 May 2018 are not limited to those mentioned in document 2. In particular, you claim that, according to the list of participants published on the above-mentioned website, other organisations were also represented at the relevant meeting.

Consequently, in your view, ‘the B[ack] T[o] [the] O[ffice] [report] is incomplete’.

The European Commission confirms that the information included in the list of the meetings available on the Europa website, to which you refer in your confirmatory application, is correct and accurate. Besides the representatives of the European Risk Forum, representatives of Dow Chemicals and the German Academy of Sciences were also present at the meeting.

However, it needs to be emphasised that the names of the representatives of the organisations mentioned above are not included in document 2. Providing access to these names would constitute personal data transfer under Article 8(b) of Regulation 45/2001.

Consequently, the consideration in point 2.1 of this decision applies by analogy to such a transfer.

¹³ List of meetings of Commissioner Vytenis Andriukaitis with organisations and self-employed individuals, accessible at:
<http://ec.europa.eu/transparencyinitiative/meetings/meeting.do;TRMEETINGID=SNw-EKxVL0XBPCvb4z8cPkq5XzZAn-htHLiNCXBi3zabXjR5EJXm!-2134235932?host=a980459e-c697-49b1-9713-5c5034a26cdc&d-6679426-p=2>.

6. 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

