



EUROPEAN COMMISSION

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C(2020) 6214 final

Ms Julia Reda  
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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2020/2472**

Dear Ms Reda,

I refer to your e-mail of 17 June 2020, registered on 18 June 2020, in which you submitted 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<sup>2</sup> (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in the handling of your request.

**1. SCOPE OF YOUR REQUEST**

In your initial application of 28 April 2020, addressed to the European Commission’s Directorate-General for Trade, you requested access to documents related to a letter sent on 20 March 2020 by the European Union Ambassador to the Republic of South Africa to the Director-General in the Office of the South African President, on the subject of South Africa’s copyright regime.

In your request, you state that you are seeking, I quote, ‘any information the Commission has in connection with the letter of 20 March 2020, as well as any information related to the South African Draft Copyright Bill’. You state that your request ‘should therefore also contain short-lived information such as drafts, inter-agency communication, e-mails,

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<sup>1</sup> OJ L 345, 29.12.2001, p. 94.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

text messages, memos, and follow-up communication, including responses to the letter of 20 March 2020'. You add that 'I am requesting all information, including internal communication, inter-service consultation, communication with the EEAS, any South African bodies, or with third parties such as external stakeholders regarding or in connection with the letter of 20 March 2020 or the South African Draft Copyright Bill'.

As you did not receive the reply from the Directorate-General for Trade within the statutory time limits, you submitted, on 17 June 2020, a confirmatory application against the lack of reply.

On 18 June 2020, however, the Directorate-General for Trade provided you with a reply to your initial request. In its reply, the Directorate-General for Trade identified 52 documents (34 documents plus the respective attachments) as falling within the scope of your request and granted (full) access to 43 documents with only personal data redacted on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001. It redacted parts of document 30 as falling beyond the scope of your request.

Moreover, upon consultations with the third party concerned, the Directorate-General for Trade refused to grant access to nine documents, namely:

- 'IFPI Comments on the Department of Trade and Industry Copyright Amendment Bill 2015', 16 September 2015, Ares(2020)2565404 (hereafter 'document 5');
- 'IFPI Comments to the Department of Trade and Industry Copyright Amendment Bill and initial Comments on the Performers' Protection Amendment Bill 2017', 7 July 2017, Ares(2020)2752752 (hereafter 'document 11');
- 'Copyright Alliance Response to the Copyright Amendment Bill', 7 July 2017, Ares(2020)2752799 (hereafter 'document 12');
- 'RE: IFPI South Africa updates', 19 October 2018, Ares(2020)2829480 (hereafter 'document 18');
- 'IFPI - Comments on Performers' Protection Bill 2016', 31 October 2018, Ares(2020)2829607 (hereafter 'document 19');
- 'South Africa copyright bill', 16 July 2018, Ares(2020)2829637 (hereafter 'document 20');
- 'South Africa - Copyright Amendment Bill 150219 email attachm5', Ares(2020)2829764 (hereafter 'document 23(e)');
- 'South Africa', 26 February 2019, Ares(2020)2829670 (hereafter 'document 29');
- 'South Africa attachment', 26 February 2019, Ares(2020)2829670 (hereafter 'document 29(a)');

on the grounds of the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001.

A full list of the documents identified was attached to the initial reply of 18 June 2020 and is already in your possession.

On 19 June 2020, in an e-mail sent to the European Commission, you stated that you wanted ‘to amend [your] confirmatory application by adding the following points, after having consulted the documents released [in the initial decision of the Directorate-General for Trade of 18 June 2020]’. The arguments that you put forward can be summarised as follows:

- Firstly, you argue that there is an overriding public interest in the disclosure of the nine documents that were refused by the Directorate-General for Trade at the initial stage (identified as documents 5, 11, 12, 18, 19, 20, 23(e), 29 and 29(a) above).

Among other issues, you state that ‘entertainment industry stakeholders have been actively participating in this public debate, including by making claims about their licensing and revenue sharing practices, when arguing against the introduction of provisions in the South African copyright bill that would strengthen the bargaining position of individual authors or performers. Disclosure of the documents in question is in the public interest, among other reasons, because these documents would shed light on the public controversy surrounding these stakeholders’ interventions in the South African legislative process’.

In addition, you request the European Commission to grant partial access to the documents ‘[s]hould the Commission come to the conclusion that despite these reasons, full disclosure of the aforementioned documents is not possible’.

- Secondly, you challenge the list of documents identified at the initial stage. In particular, you argue that the initial reply ‘does not appear to include any information that the Commission deems “short-lived” or “not important” despite my explicit request to include such information’. You refer to the European Ombudsman’s decision in Case 2134/2018/FP<sup>3</sup>, and you stress, among other issues, that ‘the European Ombudsman has concluded that “failure of the Commission to retain in its possession copies of [...] material after the complainant had exercised his [or her] fundamental right of access to documents, but before the appeal process had been completed, constituted maladministration”’.

Moreover, you argue that the initial reply does not identify documents concerning consultations with stakeholders other than ‘rightsholders’ organisations’. You add that ‘[t]he correspondence between the EEAS and the European Commission of 21 May 2018 (document 17) appears to be incomplete’.

Furthermore, you refer to document 32 and you ask the European Commission to provide ‘any documents relating to the meeting or phone call of 24 February 2020’.

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<sup>3</sup> Available at: <https://www.ombudsman.europa.eu/en/decision/en/120381>.

You also request ‘any documents, such as emails, sent to the recipient of the email of 28 February 2020 or any other recipient within DG Trade by the sender of the email of 28 February 2020, or any follow-up communication received from other stakeholders on the topic of the South African copyright bill received after the email of 28 February 2020’.

Finally, you argue that the initial reply ‘does not include any documents after the letter of EU Ambassador to the Republic of South Africa [...] to [...] [the] Director-General in the Office of the South African President, of 20 March 2020’, although your request ‘explicitly included eventual responses to the letter or any other follow-up communication, including responses to the letter of 20 March 2020’.

In your e-mail, you also request a copy of ‘the up-to-date version’ of the European Commission’s guidelines on document management and access to documents. Please note however, that this request falls beyond the scope of your application of 28 April 2020, which concerns ‘information the Commission has in connection with the letter of 20 March 2020, as well as any information related to the South African Draft Copyright Bill’.

The arguments that you put forward in your application have been taken into account in the assessment set out in the sections below.

## **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.

The European Commission has carried out a renewed search for documents falling under the scope of your application. Following this renewed search, the following documents have been identified at the confirmatory stage:

- E-mail exchanges between the Directorate-General for Trade and Evartists, 10 August 2015, Ares(2020)2552609 (hereafter ‘document 35’);
- e-mail exchange between the Directorate-General for Trade and the Delegation of the European Union to South Africa, 10-19 August 2015, reference Ares(2020)2552779 (hereafter ‘document 36’);
- e-mail from Motion Pictures Association to the Directorate-General for Trade entitled ‘RE: SA Evidence’, 2 April 2020, reference Ares(2020)3265944 (hereafter ‘document 37’), which contains the following annexes:
  - letter from a third party to the President of South Africa, 8 July 2019 (hereafter ‘document 37.1’);

- draft letter from a third party to the President of South Africa (hereafter ‘document 37.2’);
- letter from a third party, 22 February 2019 (hereafter ‘document 37.3’);
- letter from a third party to the President of South Africa, 4 April 2019 (hereafter ‘document 37.4’);
- comments on the copyright amendment bill and performers protection amendment bill, 22 February 2019 (hereafter ‘document 37.5’);
- letter to the National Council of Provinces, 22 February 2019 (hereafter ‘document 37.6’).

I take note on your comments regarding the identification of documents and the above-referred inquiry of the European Ombudsman. In this respect, I would like to note that your request covers a large number of documents (37) and their respective attachments, leading to a total of 61 files, which have been duly identified and analysed by the European Commission. The European Commission could not identify any documents that would correspond to the description detailed in your application in addition to the above-referred documents and their annexes.

As regards your request for documents related to the letter of the European Union Ambassador, dated 20 March 2020 and addressed to the authorities of the Republic of South Africa, please note that there was no follow-up communication with the Office of the South African President.

Please also note that the search for documents drawn up or received by the institution on the topic of your request was made with reference to the period until 28 April 2020, which is the date of your initial application.

In the context of the confirmatory review, the European Commission (re)consulted, in accordance with Article 4(4) of Regulation (EC) No 1049/2001, the third parties from which documents 5, 11, 12, 18, 19, 20, 23(e), 29, 29(a), and 37 (including documents 37.1 to 37.6) originate.

In response to these consultations, the International Federation of the Phonographic Industry (IFPI) agreed with the disclosure of the documents that were refused at the initial stage (documents 5, 11, 12, 18, 19, 20, 23(e), 29 and 29(a)). The third party from which document 35 partially originates (Evarartists) agreed with the disclosure of the document in question. Motion Pictures Association, which submitted document 37 and its attachments, agreed with the disclosure of these documents, subject to the redaction of personal data.

Against this background, I can inform you that:

- full access is granted to document 37.2;

- access is granted to documents 5, 11, 12, 18, 19, 20, 23(e), 29, 29(a), 35, 36, 37, 37.1, 37.3, 37.4, 37.5, 37.6, with only personal data redacted on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning the assessment are set out below.

## **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*)<sup>4</sup>, 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 data<sup>5</sup> (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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/EC<sup>6</sup> (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’<sup>7</sup>.

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

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<sup>4</sup> 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.

<sup>5</sup> OJ L 8, 12.1.2001, p. 1.

<sup>6</sup> OJ L 295, 21.11.2018, p. 39.

<sup>7</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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’<sup>8</sup>.

Documents 5, 11, 12, 18, 19, 20, 23(e), 29, 29(a), 35, 36, 37, 37.1, 37.3, 37.4, 37.5, and 37.6 contain personal data such as the names, surnames and contact details of persons who do not form part of the senior management of the European Commission. The documents also contain personal data such as names and surnames, phone numbers, job positions and e-mails from third party representatives. Several documents contain handwritten signatures of the persons concerned. In addition, document 37.5 contains the curriculum vitae of an identified person.

The names<sup>9</sup> 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.

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<sup>10</sup>. 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.

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<sup>8</sup> 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.

<sup>9</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>10</sup> 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.

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.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception 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.

However, for the reasons explained above, no meaningful further partial access is possible without undermining the interest described above.

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

Finally, please note that documents originating from third parties are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originator, who may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.



## **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*  
*Ilze JUHANSONE*  
*Secretary-General*

Enclosures: (18)