



EUROPEAN COMMISSION

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63526 Erlensee
Germany

**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 2019/152**

Dear ██████████,

I refer to your e-mail of 21 February 2019, registered on 22 February 2019, 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 APPLICATION

In your initial application of 11 December 2018 addressed to the Directorate-General for Research and Innovation you requested ‘full and uncensored access to all emails’ referred to in the reply of that Directorate-General to your previous initial application Gestdem 2018/5387.

In that application, you requested access to ‘[r]ecords of any possible meetings or communications between EU special envoy ██████████ and the scholarly publisher Frontiers Media SA, in the years 2017 and 2018’. You underlined that you were particularly interested in the contacts of ██████████ with three ‘Frontiers executives’ whose names you listed in your initial application Gestdem 2018/5387. With regard to the email exchanges between the above-mentioned ‘Frontiers executives’ and ██████████, you clarified that ‘[you] understand the contents of ██████████ work emails, phone calls

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

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

and meetings might be protected' Consequently, '[you request access to] [j]ust dates and names of correspondents'.

In its initial reply of 12 November 2018 to Gestdem 2018/5387, the Directorate-General for Research and Innovation provided you with a list of [REDACTED] e-mail exchanges with Frontiers representatives during 2018. The list contained the headings of e-mails, which included details on the requested exchanges³.

On 14 November 2018 you submitted the confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001, in which you requested, among others, access to the content of the emails included in the list provided by the Directorate-General for Research and Innovation in the initial reply. The Secretariat-General of the European Commission considered that this exceeds the scope of your initial application Gestdem 2018/5387 and informed you that you were entitled to submit a new application for access to the content of the above-mentioned e-mails.

On 11 December 2018, you submitted the new application, which was registered under reference number Gestdem 2019/152 and attributed on 9 January 2019 to the European Political Strategy Centre of the European Commission for handling and reply.

The European Commission identified the following documents as falling under the scope of your application:

16 email exchanges between [REDACTED] and the representatives of Frontiers Media, covering the period 26 March 2018 – 19 October 2018, numbered 1 – 8 and 11 – 18⁴, reference: Ares(2019)1272493 (hereafter 'documents requested').

On 16 February 2019, the European Political Strategy Centre of the European Commission replied to your initial application. It refused access to the documents requested based on the exceptions provided for in Article 4(2) of Regulation (EC) No 1049/2001⁵. In its assessment of the case, the European Political Strategy Centre of the European Commission took into account the position of the originator of the documents, which it consulted in line with the provisions of Article 4(4) of Regulation (EC) No 1049/2001.

You submitted your confirmatory application on 21 February 2019, asking for the review of that position.

³ The disclosed details included the name of the sender, the name of the main representative of Frontiers, the generic e-mail address of Frontier, the domain of the e-mail addresses of non-senior Frontier representatives, the name and the domain e-mail addresses of European Commission staff members holding a senior management position, the domain of e-mail addresses of Commission officials not holding any senior management position, the date and the time these exchanges took place, and the subject of the exchange.

⁴ Exchanges under number 9 and 10 are between the representatives of Frontiers Media SA and third parties and therefore they fall outside the scope of your application Gestdem 2019/152.

⁵ The European Political Strategy Centre did not specify which interest provided for in Article 4(2) of Regulation (EC) No 1049/2001 warrants refusal of access to the documents concerned.

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 documents identified as falling under the scope of your application include email messages originating from a third party.

Under the provisions of Article 4(4) of Regulation (EC) No 1049/2001 and with a view to taking into account the arguments put forward in your confirmatory application, a renewed consultation of the third party author was initiated by the Secretariat-General on 12 March 2019 and 8 May 2019, respectively.

The originator of the documents concerned maintained its opposition to the disclosure of the documents, based on the exception provided for in Article 4(1)(b) and Article 4(2), first indent, of Regulation (EC) No 1049/2001 (protection of, respectively, privacy and the integrity of individual and commercial interests of a natural or legal person).

Having carried out a detailed examination of the documents requested, taking into account the result of the third party consultations at initial and confirmatory levels, I can inform you that partial access is granted to the documents. The reasons given by documents' originator for its objection are indeed not capable of justifying the application of the above-mentioned exceptions to the entirety of the documents.

Nonetheless, I consider that the argumentation provided does apply to the withheld parts of the documents, which were redacted based on the above-mentioned exceptions provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 4(2), first indent, of that regulation.

The detailed reasons are set out below.

As mentioned in part 1 of the decision, the relevant parts of the above-mentioned documents include the exchanges between the representatives of Frontiers Media SA and third parties. They do not fall within the scope of your application Gestdem 2019/152 and were redacted as such.

Please note, however, that the actual transmission of the documents is subject to the absence of a request by the third party originator for interim measures, as it will be explained below in paragraph 2.3.

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

Please also note that the documents requested include the email messages originating from Frontiers Media SA. They are disclosed for information only and their original

meaning or message should not be distorted. Please note that the Commission does not assume liability stemming from the reuse.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘the 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*),⁶ 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 data⁷ (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) 2018/1725⁸.

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 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 16 email exchanges in question are email messages sent or received by [REDACTED] and the representatives of Frontiers Media SA from their individual email addresses. Consequently, their contents is associated to and linked with the concrete individuals who the authors of the relevant email messages.

As mentioned in part 1 of this decision, on 12 November 2018 the Directorate-General for Research and Innovation provided you the list containing information on exchanges between [REDACTED] and Frontiers Media SA. Therefore it would be possible to identify the authors of the given email exchange, by comparing the list provided on 12 November 2018 and the document released in this decision. Those specific circumstances have been taken into account in processing your request for access to documents.

In particular, a certain number of information contained in those 16 email exchanges , in the present circumstances, allow identifying the data subject concerned and consequently

⁶ Judgment of the Court of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59 (hereafter ‘*Bavarian Lager*’).

⁷ Official Journal L 8 of 12.1.2001, p. 1.

⁸ 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. Official Journal L 205 of 21.11.2018, p. 39.

constitute personal data within the meaning of Article 3(1) of Regulation (EU) 2018/1725 mentioned above.

Indeed, in all emails exchanges, except for the exchange marked as ‘15’, the heading of the exchange constitutes personal data (including the name, surname, email address of the sender, recipient, as well as the date and subject of the of the email) since this information can be compared with the list of emails provided following your former application.

With regard to the actual content of the 16 email exchanges in question, the following information constitute personal data: the exchanges marked as ‘12’, ‘13’ and ‘14’ contain comments containing personal appreciations of the identified individual ([REDACTED]). In the exchanges marked as ‘4’, ‘5’, ‘7’, ‘8’, ‘16’, ‘17’ and ‘18’, the redacted parts of the document requested include information about participation of the [REDACTED] and the representatives of Frontiers Media SA in various public events. This includes the name of the event, its exact dates and venue that, in the present circumstances, contain information which enable to identify the data subject.

The relevant undisclosed parts of the document requested includes also the names, surnames, contact details (email addresses and telephone numbers), as well as the names, surnames and contact details (email and office addresses, telephone numbers) of the staff members of the European Commission not holding any senior management position.

The above-mentioned information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) 2018/1725 and in the sense of the *Bavarian Lager* judgment⁹.

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.

Furthermore, 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.¹⁰ 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.

⁹ *Bavarian Lager*, cited above, paragraph 70.

¹⁰ 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.

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 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 subject's legitimate interests might be prejudiced.

In this context, I would like to point out that the right to the protection of the 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 has not given any of these two rights primacy over each other, as confirmed by the *Bavarian Lager* case-law referred to above¹¹.

Based on the information at my disposal, I note that there is a risk that the disclosure of the information appearing in the requested document, such as information relating to certain aspects of their professional activities (agendas and travelling arrangements) or comments of personal nature would prejudice the legitimate interests of the data subjects concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9(1)(b) of Regulation (EU) 2018/1725, 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 disclosure of the personal data concerned.

With regard to the information that does not fall under the definition of personal data, such as the relevant redacted parts of the exchanges marked as '4', '5', '7', '8' and '15', containing the personal comments of the representatives of Frontiers Media SA, I consider that their public disclosure would undermine the privacy of the persons concerned. Indeed, it is still possible to associate the above-mentioned comments of strictly personal character, with one of only three individuals, given that the scope of your application for access to documents, encompasses the exchanges between [REDACTED] and three, named 'Frontiers executives'. Consequently, the public disclosure of the personal comments would have impact on the privacy of the three individuals in question and therefore Article 4(1)(b) of Regulation (EC) No 1049/2001 applies thereto.

¹¹ *Bavarian Lager*, cited above, paragraph 56.

2.2 Protection of commercial interests of a natural or legal person

Article 4(2), first indent, of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'.

The relevant parts of the requested documents include the detailed position of Frontiers Media SA on various policy options and its assessment of their impact on its business model.

The above-mentioned information has to be considered as commercially sensitive business information of the economic operator in question (Frontiers Media SA).

Its disclosure, through the public release of the relevant parts of the requested documents under Regulation (EC) No 1049/2001, would clearly undermine the commercial interests of the above-mentioned economic operator. The latter provided the commercially sensitive information contained in the documents under the legitimate expectation that it would not be publically released.

In the light of the above, it is evident that there is a reasonably foreseeable risk that public disclosure of the relevant undisclosed parts of 16 email exchanges concerned and in particular, the parts containing commercially sensitive business information would harm the interest protected by Article 4(2), first indent of Regulation (EC) No 1049/2001.

2.3 Disclosure against the explicit opinion of the author

According to Article 5(5) and (6) of the detailed rules of application of Regulation (EC) No 1049/2001¹², '[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.'

Since the decision to grant partial access is taken against the objection of the third-party author expressed at initial and confirmatory levels, the European Commission will inform Frontiers Media SA of its decision to give partial access to the documents requested. The European Commission will not grant such disclosure until a period of ten working days has elapsed from the formal notification of this

¹² Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), Official Journal L 345 of 29.12.2001, p. 94.

decision to the third party author, in accordance with the provisions mentioned above.

This time period will allow the third party author to inform the European Commission whether it intends to object to the disclosure using the remedies available to it, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the third-party author has not signalled its intention to avail itself of the remedies at its disposal, the European Commission will forward the redacted documents to you.

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.

The exceptions laid down in Article 4(2) 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 argue that ‘[...] EU scientists and general public have the right to know who and why influences European research policies [...]’.

Please note however that, even if members of the public have indeed expressed an interest in the subject matter covered by the documents requested and have pointed to a general need for public transparency related thereto, the Court of Justice, in the *Strack* case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance¹³. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹⁴.

In your confirmatory application, you do not refer to any specific overriding public interest that would warrant public disclosure of the specific type of information included in the document in question.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the commercial inserts of the economic operator concerned, grounded in Article 4(2), first indent, of Regulation (EC) No 1049/2001.

¹³ 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 128.

¹⁴ Ibid, paragraph 129.

4. PARTIAL ACCESS

Partial access is hereby granted to the document requested.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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

Enclosure: (1)