



EUROPEAN COMMISSION

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[REDACTED]
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**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 2019/3595**

Dear [REDACTED],

I refer to your letter of 22 August 2019, registered on the same date, 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

On 21 July 2019, you submitted the initial application to addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, I quote, ‘[...] requesting access to:

- i. Any documents related to the European Commission's assessment or correspondence between the different Directorates-General related to the safeguard procedure of Article 129 of the R[egistration], E[valuation], A[uthorisation] and R[estriction of Chemicals] Regulation [...] used by France and leading to Commission Implementing Decision (EU) 2019/961 [...], as of 14 November 2018;
- ii. Any documents (as of 14 November 2019) related to the discussions of the draft Commission Implementing Decision at the R[egistration], E[valuation],

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

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

A[uthorisation] and R[estriction of Chemicals] Committee meeting of 12 April 2019 and

- iii. Any documents (as of 14 November 2019) related to the use of the procedure under Article 129 of the R[egistration], E[valuation], A[uthorisation] and R[estriction of Chemicals] Regulation by France for concerning the cellulose wadding insulation materials with ammonium salts additives and leading to Commission Implementing Decision [...], in particular:
- Any correspondence between France and the European Commission, and
 - Any documents related to the European Commission's assessment of urgency.'

The European Commission identified 29 documents falling under the scope of your initial application³.

In its initial reply of 1 August 2019, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs informed you that documents 13, 17, 25 and 28 were publically available and provided the hyperlinks thereto.

With regard to the remaining documents, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs granted:

- full access to documents 2, 3, 11, 14, 15, 16, 19, 21 and 27,
- wide partial access to documents 1, 4, 6, 7, 8, 9, 10, 12, 18, 20, 22, 23, 24, 26 and 29, with personal data redacted based on the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001,
- partial access to document 5, with the limited parts withheld based on the above-mentioned exception in Article 4(1)(b) of Regulation (EC) No 1049/2001, as well as the exception in Article 4(2), second indent, of that regulation, protecting the legal advice.

You submitted your confirmatory application on 22 August 2019, asking for the review of that position.

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.

³ The full list of these documents was enclosed to the reply of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of 1 August 2019.

Following this review, I inform you that the information included in document 5, redacted at the initial stage because of the exception in Article 4(2), second indent, of Regulation (EC) No 1049/2001 (protection of the court proceedings and legal advice) is now disclosed. Consequently, wide partial access is granted to the above-mentioned document, with only personal data redacted based on the exception in Article 4(1)(b) of the said regulation.

With regard to documents 1, 4, 6, 7, 8, 9, 10, 12, 18, 20, 22, 23, 24, 26 and 29, I confirm the position of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs granting wide partial access thereto, with the relevant parts redacted by virtue of the above-mentioned exception in Article 4(1)(b) of Regulation (EC) No 1049/2001.

The detailed reasons 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*)⁴, 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 data⁵ (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/EC⁶ (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.

⁴ 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.

⁵ Official Journal L 8 of 12.1.2001, p. 1.

⁶ Official Journal L 205 of 21.11.2018, p. 39.

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’.⁷

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’.⁸

Documents 1, 4, 5, 6, 7, 8, 9, 10, 12, 18, 20, 22, 23, 24, 26 and 29, contain personal data such as the names, surnames, initials, as well as office and email addresses of the staff members of the European Commission not holding any senior management position. They 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.⁹ 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.

⁷ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁸ 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.

⁹ 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.

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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 does not need to be balanced against overriding public interest in disclosure.

4. 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

