



EUROPEAN COMMISSION

Brussels, 16.10.2019
C(2019) 7541 final

[REDACTED]
[REDACTED]
B-1190 Bruxelles

**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 2019/3410**

Dear [REDACTED],

I refer to your e-mail of 19 August 2019, registered on 20 August 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

On 14 June 2019 you submitted two initial applications for access to documents addressed relating to the meetings of the staff members of the European Commission with the consulting company Fleishman-Hillard. Indeed, in your initial applications, which were addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs³ and the Directorate-General for Energy⁴, you asked for access to, I quote, ‘[...] *les documents contenant ces informations: Contacts, rendez-vous, compte-rendus de réunions avec Fleishman-Hillard en 2018 – 2019*’.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145 31.5.2001, p. 43.

³ Registered as Gestdem 2019/3630 and 2019/3660.

⁴ Registered as Gestdem 2019/3410

As your initial application was considered as not sufficiently clear, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs contacted you in order to clarify its scope. In the emails of 17 and 19 June 2019, you replied that you were interested in documents concerning, I quote, '[c]ontacts about [the Registration, Evaluation, Authorisation and Restriction of Chemicals⁵], chemicals and about gas industry'.

You also clarified that with regard to the issue of the Registration, Evaluation, Authorisation and Restriction of Chemicals, you were interested in documents concerning contacts between Fleishman-Hillard and the staff of the European Commission at all hierarchical levels. As regards the 'gas topic', you explained that your application covers documents concerning contacts between the above-mentioned company and the staff of the European Commission at the level from the Commissioner to the head of unit.

The above-mentioned clarifications were taken into account also by the Directorate-General for Energy in its assessment of your application Gestdem 2019/3410. In its reply of 31 July 2019, the Directorate-General for Energy informed you that it did not hold any documents falling under the scope of your application.

You submitted your confirmatory application on 19 August 2019, asking for the review of that position⁶.

Following your confirmatory application, the European Commission has carried out a renewed search for the documents concerned and identified the following ones:

- Email from Fleishman-Hillard of 22 May 2018 to the European Commission, with the attachment, reference Ares(2019) 5938518, (hereafter 'document 1');
- Email from Fleishman-Hillard of 30 May 2018 to the European Commission and the reply of the European Commission of 31 May 2018, with the attachment, reference Ares(2019) 5938792, (hereafter 'document 2');
- Email from Fleishman-Hillard of 6 June 2018 to the European Commission and the follow-up email of 8 June with the attachment, reference Ares(2019), 5962021 (hereafter 'document 3').

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.

⁵ REACH.

⁶ I note that you did not contest the position of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs included in its replies to your initial applications Gestdem 2019/3630 and 2019/3660, provided on, respectively, 10 July 2019 and 1 August 2019.

As mentioned in point 1 of this decision, following your confirmatory application, the European Commission identified the above-mentioned documents 1-3 and assessed them from the point of view of the applicability of the exceptions in Article 4 of Regulation (EC) No 1049/2001.

Following this assessment, I can inform you that (wide) partial access is granted to the documents concerned.

The relevant undisclosed parts of the documents require protection under the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

In the assessment, the European Commission took into account the position of the third party originator, consulted in line with Article 4(4) of Regulation (EC) No 1049/2001, which did not object to the (partial) disclosure of the documents concerned.

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*)⁷, 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 data⁸ (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/EC⁹ (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.

⁷ 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.

⁸ OJ L 8 12.1.2001, p. 1.

⁹ OJ L 205 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’.¹⁰

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’.¹¹

Documents 1-3 include the names and contact details of staff members of the European Commission not holding any senior management position. They include also the names and contact details of third parties (representatives of Fleishman-Hillard).

The names¹² 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.¹³ 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.

¹⁰ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

¹¹ 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.

¹² *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹³ 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, included in the relevant undisclosed parts of documents 1-3, 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 in Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

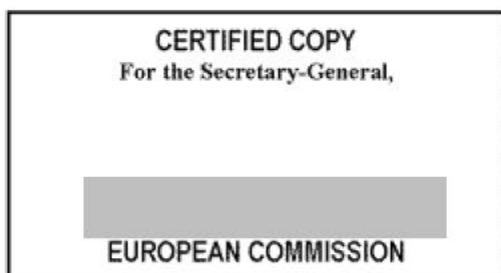
4. PARTIAL ACCESS

Partial access is hereby granted to documents 1-3.

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

