



EUROPEAN COMMISSION

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Ms Myriam Douo
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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 2021/747**

Dear Ms Douo,

I refer to your letter of 12 April 2021, registered on the same day, 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 documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 12 February 2021, addressed to the Directorate-General for Climate Action, you requested access to:

- ‘- all correspondence, including attachments (i.e. any emails, mail correspondence or telephone call notes) between DG CLIMA, including any Cabinet Members and/or officials, and Ms Nahalie Tocci;
- a list of all meetings and/or calls attended by DG CLIMA, including any Cabinet Members and/or official, that were attended by Ms Nathalie Tocci as well;

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

- all documents prepared for the purpose of the meetings issued both in preparation and after the meetings took place’.

You further clarified that this list should include ‘date, individuals attending and organisational affiliation, list of issues discussed, as well as minutes and other reports of these meetings and/or calls’.

The European Commission has identified two documents as falling under the scope of your request, registered under reference Ares(2021)221545 of 11 January 2021.

In its initial reply of 30 March 2020¹, the Directorate-General for Climate Action refused access to these documents based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of an individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding 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.

Following this review, I regret to inform you that I have to confirm the initial decision of Directorate-General for Climate Action to refuse access, based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of an individual) of Regulation (EC) No 1049/2001, for the reasons 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*)³, 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 data⁴ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

³ 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.

⁴ OJ L 8, 12.1.2001, p. 1.

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/EC⁵ (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’⁶.

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’⁷.

In your application, you list the documents you wish to obtain access with reference to an identified natural person. The two documents that fall under the scope of this request contain, among others, personal data such as the name, function and handwritten signature of the person concerned by the request, as well as names, functions or handwritten signature of other natural persons.

The identified natural person mentioned in your request is neither a public figure nor a member of the senior management of the European Commission in the context of the two documents identified in the scope of your request.

In your confirmatory application, you point out that other Directorates-General have disclosed certain documents in past requests for access to documents⁸ related to the same natural person and you argue that access to these documents should also be provided as other comparable documents have already been disclosed.

⁵ OJ L 295, 21.11.2018, p. 39.

⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁷ 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.

⁸ GESTDEM 2020/4463, GESTDEM 2020/4530 and GESTDEM 2020/5413.

While indeed the General Court has accepted in *Evropaiki Dynamiki*⁹ that disclosure of certain documents cannot be withheld if comparable documents are in the public domain, the situation is not comparable.

First, the information contained in the two documents concerned by your request is not public information. It has not been made public by the European Commission or by the natural person concerned.

Second, the documents and the context in which they were produced do not relate to Ms Tocci's position as special adviser nor concern the period in which she held this function. While more transparency is provided to certain documents related to persons who hold this function in line with Commission Decision C(2007)6655 regarding rules on special advisers to the Commission¹⁰ and the specific privacy statement¹¹, this cannot be extended to their other personal or professional positions held outside the mandate of special advisor.

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. Moreover, the documents contain other information that can be considered personal data because it can be linked to a natural individual, such as the context in which the documents were produced, the personal/professional interests of the individuals concerned etc.

In *Nowak*¹³, the Court of Justice has acknowledged that '[t]he use of the expression "any information" in the definition of the concept of "personal data", within Article 2(a) of Directive 95/46, reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it "relates" to the data subject' (emphasis added). As regards the latter condition, it is satisfied where the information, by reason of its content, purpose or effect, is linked to a particular person.

In the *VG v Commission* judgment, the General Court ruled that even anonymised data should be considered as personal data, if it would be possible to link them to an identifiable natural person through additional information.¹⁴ In the present case, a clear link to an identifiable person remains, since your request focuses on an identified natural

⁹ Judgment of the General Court of 6 December 2012, *Evropaiki Dynamiki v Commission*, T-167/10, EU:T:2012:651.

¹⁰ https://ec.europa.eu/info/sites/default/files/commission-decision-rules-on-special-advisers_c2007_6655_en_0.pdf

¹¹ https://ec.europa.eu/info/sites/default/files/privacy_statement_-_special_advisers_-_may_2020.pdf

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

¹³ Judgment of the Court of Justice of 20 December 2017, *Peter Nowak v Data Protection Commissioner* (Request for a preliminary ruling from the Supreme Court), C-434/16, EU:C:2017:994, paragraphs 34-35.

¹⁴ Judgment of the General Court of 27 November 2018, *VG v Commission*, Joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 74.

person. Therefore, it is clear that the information contained in the requested documents constitutes personal data.

I would also like to point out that disclosure of documents under Regulation (EC) No 1049/2001 has an *erga omnes* effect, in the sense that such documents become public to any citizen, not just to you. On the other hand, the Commission decision containing the context of the request is addressed to you personally and is not proactively published.

If the two documents, whose content relates to her professional activities after the expiry of her mandate as special adviser, were to be disclosed with Ms Tocci's personal data redacted according to the applicable rules as she is neither a public figure nor a member of the senior management of the Institution, this would lead to the situation in which you personally would have access to privileged information since you would know that the disclosed documents relate to this natural person, as it is the reason for which they were identified.

In fact, we consider that the detailed identification of documents and their disclosure in the context of your request conveys certain information in relation to the individual (the context in which the documents were sent/received) which undermines the protection of the privacy and personal data of the individual. Therefore, it is not possible to disclose *erga omnes* documents where personal data was redacted while the text of the confirmatory decision refers to an identified data subject.

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 data¹⁵. 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

¹⁵ 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.

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 confirmatory application, you consider that it is in the public interest to receive these documents because you wish to check whether the specific measures taken by the European External Action Service to limit conflict of interest have been implemented.

According to the case law in the *Psara*¹⁶ judgment, a general reference to the purpose of a journalistic investigation does not show the necessity of a transmission of personal data in the light of your objective to ensure public scrutiny. Moreover, abstract and general references to possible wrongdoings cannot justify the need for the transmission of the personal data, let alone its proportionality.

In this respect, the scrutiny of the activities of special advisers, who are subject to the Conditions of Employment of Other Servants of the European Communities, falls in the remit of the respective Appointing Authority. Regarding the public scrutiny of the Commission as to the respect of its rules, the Court also notes that 'no automatic priority can be conferred on the objective of transparency over the right to protection of personal data'¹⁷. Furthermore, as explained above, these documents relate to professional activities of Ms Tocci after the expiry of her mandate as special adviser, which further reinforces our conclusion.

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 as any member of the public could then have access to her personal data.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the above-mentioned documents, 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 also that 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.

¹⁶ Judgment of the General Court of 25 September 2018, *Maria Psara and Others v European Parliament* (hereafter referred to as '*Psara v European Parliament*'), Joined Cases T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraphs 79 and 84.

¹⁷ Judgment in *Psara v European Parliament*, cited above, paragraph 91.

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.

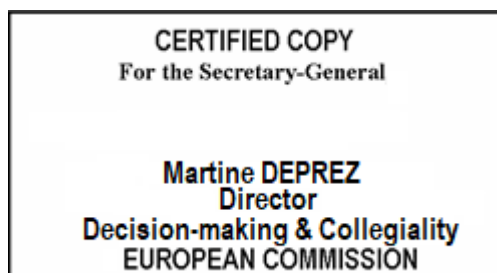
However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

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

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