

Dear Secretariat-General,

I am filing the following confirmatory application with regards to my access to documents request 'Former commissioner Neelie Kroes & Uber', GestDem 2022/3974.

On 11 July 2022, I had requested "Any documents related to requests by former commissioner Neelie Kroes to start work for platform company Uber before the expiry of her 18-month 'cooling-off' period in 2015/16."

On 2 August 2022, I received your response to my request. You stated that all documents related to examinations *and* approvals had already been published according to the Code of Conduct for the Members of the European Commission (the Code of Conduct).

Regarding documents of notifications that were withdrawn before a final decision was made, you stated that these documents fell under the privacy exception outlined in Article 4(1)(b) of Regulation (EC) 1049/2001. You argued that since only decisions and related documents are published according to the Code of Conduct, withdrawn notifications and related documents fall in the sphere of former Commissioner's private life. You also stated that releasing these documents could potentially harm the privacy of third persons who might have accepted the declined position instead of the former Commissioner.

You applied this also to a potential release of these documents, arguing that they contain specific personal data of former Commissioners and other data that would enable the identification of Commission staff not forming part of senior management. You argued that relevant data protection legislation, specifically Regulation (EU) 2018/1725, therefore applied to this data and that I had not put forward the argument necessary under this legislation for data to be transmitted for a specific purpose of public interest.

You therefore denied my request for access to documents, including partial access, for example through the release of a list of documents covered by my request.

I would like to ask you to reconsider your decision for the following reasons:

1) Personal data can be redacted

You argued that the documents in question contain personal data that falls under data protection legislation. However, according to Article 4(6) of Regulation 1049/2001, "if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released." Consequently, it is usual practice for authorities from which documents have been requested under Regulation 1049/2001 to redact the personal data of people not part of senior Commission management. I would like to give my agreement to this practice in this case.

2) A withdrawn application is still a document

You argued that since withdrawn notifications and related documents are not published according to Article 11(7) of the Code of Conduct, they "fall and remain afterwards within the sphere of the former Commissioner's private life and cannot be released."

Indeed, Article 11(7) of the Code of Conduct specifies that only

"Decisions taken under paragraph (3) determining compatibility with Article 245 of the Treaty on the Functioning of the European Union and related opinions of the Independent Ethical Committee shall be made public with due consideration to the protection of personal data."

However, this only concerns their proactive publication under the provisions of the Code of Conduct and does not impact their potential release under Regulation 1049/2001. Article 2 of the Regulation states it applies to “all documents held by an institution, that is to say, documents drawn up or received by it and in its possession”. Article 3(a) of the Regulation states that

“‘document’ shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;”

You stated in your response to my request that “the notification of an envisaged activity is merely the start of an administrative procedure”. The notification therefore seems to be a document received by an institution and concerning a matter relating to an activity falling within an institution’s sphere of responsibility. The same seems to apply to all related documents, including, for example, any potential opinions of the Independent Ethical Committee.

Notwithstanding that they should not be published proactively under the Code of Conduct, these documents should therefore still be released on request under Regulation 1049/2001.

3) The privacy exception does not apply

You argued that releasing the documents in question would harm the privacy and integrity of the Commissioners involved. You also argued that their release could potentially harm the privacy of third persons who might have accepted the declined position instead of the former Commissioner, or for the reputation of the entity or organisations for which a former Commissioner may have decided to perform a professional activity instead.

Regarding the reputation of the entity or organisations for which the former Commissioner may have decided to perform a professional activity instead, Article 4(1)(b) concerns the privacy and the integrity of the individual and does therefore not apply to entities or organisations.

Regarding a potential harm to the privacy of third persons who might have accepted the declined position instead of the former Commissioner, you have not proven explicitly how documents concerned with an administrative procedure regarding one person would impact the privacy of other people, whose only connection is a potential application to the same post.

Regarding a potential harm to the privacy and integrity of the Commissioners involved, you argued that the withdrawn notifications and any related documents “are without relevance for the above-mentioned obligations of former Commissioners and the public interests these obligations aim to protect.”

However, Article 11(1) of the Code of Conduct binds current as well as former Commissioners to certain obligations. These obligations are, in a large part, concerned with the professional activities of former Commissioners that “give rise to lobbying or advocacy vis-à-vis the Commission and its services”. The documents in question do have relevance for the obligations of former Commissioners, as they concern an activity exactly as described in the Code of Conduct. They therefore do not concern the activities of a private person, but of a former Commissioner that is still bound to uphold these special obligations.

The documents in question should therefore not be subject to the privacy exception of Article 4(1)(b) of Regulation 1049/2001.

Thank you for your consideration,

Maximilian Henning

Darmstadt, 02.08.2022