



EUROPEAN COMMISSION

Brussels, 21.03.2022
C(2023) 2089 final

Mr Bram Vranken
Rue d'Edimbourg 26
1050 Brussels
Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory applications for access to documents under Regulation
(EC) No 1049/2001 – EASE 2022/5795**

Dear Mr Vranken,

I refer to your e-mail of 3 November 2022, registered on 9 November 2022, 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 (hereinafter ‘Regulation (EC) No 1049/2001’).

Please excuse the delay in replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 11 October 2022, addressed to the Commission’s Directorate-General for Human Resources and Security, you requested access to

‘documents which relate to any article 16, article 12B and article 40 (staff regulations) applications made by [X³], former employee at DG Competition.

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

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

³ In your initial application, you referred to an identified individual who is neither a public figure acting in a public capacity nor a member of the senior management of the Commission. For personal data protection reasons, the name of this individual has been replaced by ‘X’ in this decision.

In particular, [...] a note of all [X] job titles at DG Comp including dates held; copies of any application(s) that he has made under article 12b, 16 and 40 to undertake a new professional activity; and all documents (correspondence, emails, meeting notes etc) related to the authorisation of the new role or roles.'

In its reply to your initial application, dated 28 October 2022, the Directorate-General for Human Resources and Security informed you that

'your request [could not] be handled as handling your request, including the confirmation of the existence of documents falling under the scope of your request or not, and any identification of (a) document(s) covered by your request (if any), [was] prevented 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/EC⁴ (hereinafter 'Regulation (EU) 2018/1725')].'

In this regard, the Directorate-General for Human Resources and Security explained that

'[i]nformation about the existence of documents falling under the scope of your request, formulated in relation to an identified or identifiable natural person, and their identification, if any, constitutes processing of personal data and reveals information relating to an identified or identifiable natural person [...].'

In your confirmatory application, you request the Commission to review the above-mentioned position of the Directorate-General for Human Resources and Security. You support your request with arguments which are addressed below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001 AND REGULATION (EU) 2018/1725

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply to the initial application, issued by the Commission service responsible.

Following this review in relation to your confirmatory application at hand, I regret to inform you that the Secretariat-General cannot confirm nor deny the existence of any documents held by the Commission and falling within the scope of your request as such a confirmation or denial would be tantamount to a breach by the Commission of the Community legislation regarding the protection of personal data.

Indeed, as already explained to you by the Directorate-General for Human Resources and Security in its reply to your initial application, information about the existence of documents

⁴ Official Journal L 295, 21.11.2018, p. 39.

falling within the scope of an application for access to documents which is formulated in such a way that it relates to an identified or identifiable natural person, and identification of such documents, if any, reveals information relating to that identified or identifiable natural person, which constitutes processing of personal data within the meaning of the relevant provisions of Article 3 of Regulation (EU) 2018/1725.

In this respect, please note that in its judgment in Case C-28/08 P (*Bavarian Lager*)⁵, 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 data⁶ (hereinafter ‘Regulation (EC) No 45/2001’) becomes fully applicable. Although as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725. In this context, it is to be noted that, as confirmed by the Court of Justice in the *Rechnungshof* case, ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’⁷.

Please note that, 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 data⁸. 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.

⁵ 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.

⁶ OJ L 8, 12.1.2001, p. 1.

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 Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

In order to establish the necessity to have the said personal data transmitted to you, you argue that

‘[t]here is a clear public interest in disclosing [the documents requested as a]ccording to media reports and the website of [X’s] new employer, [X] has passed multiple times through what is known as the revolving door.’

Subsequently, you quote media reports detailing X’s recent career moves and changes of employer and, on that basis, you claim that

‘[t]here is a clear risk of a conflict of interest in [X’s] joining the private sector so shortly after having worked at the European Commission. Especially as [X] might advise companies in [X’s] new role on anti-trust cases the European Commission is currently working on.’

Finally, you make a reference to the findings of the European Ombudsman’s Decision of 16 May 2022 on how the Commission manages ‘revolving door’ moves of its staff members⁹, Report of 18 May 2022 on the inspection and meeting of the European Ombudsman’s inquiry team on how the Commission handles the challenge of “revolving door” situations involving its (former) staff members¹⁰ and the European Parliament’s Report of 18 July 2021 on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body¹¹. In this context, you point out that

‘monitoring and public scrutiny play an important role in guaranteeing transparency, accountability and a check on possible conflict of interests[, notably as regards Article 16 decisions, where] the Commission relies also on external scrutiny by other institutions, the public, and third parties.’

As a general note, the question of Commission staff members’ potential conflict with the legitimate interests of the institution is addressed in Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community¹² (hereinafter ‘Staff Regulations’), notably its Title II ‘Rights and obligations’.

As regards the avoidance of potential conflict of interest of Commission staff members wishing to engage in occupational activities outside the Commission, the Staff Regulations ensure that no such activities that might be incompatible with the interests of the institution are carried out without a prior permission granted, upon request, by the respective Appointing Authority. This condition applies to outside activities both in active service¹³ as well as during leave on

⁹ Available at: <https://www.ombudsman.europa.eu/en/decision/en/155953>

¹⁰ Available at: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/152861>

¹¹ Available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0260_EN.html

¹² OJ P 045 14.6.1962, p. 1385.

¹³ Article 12b of the Staff Regulations.

personal grounds¹⁴. Also, engaging in an occupational activity after leaving the service requires that the respective Appointing Authority is duly notified¹⁵.

Please note that in each of the above-mentioned situations, a specific set of internal rules applies, as laid down in Commission Decision C(2018) 4048 final of 29 June 2018 on outside activities and assignments and on occupational after leaving the Service (hereinafter ‘decision’). The decision introduces rigorous material and temporal provisions concerning, *inter alia*, the need for prior permission, prohibited activities and maximum net remuneration, as well as makes a reference to disciplinary measures applicable under the Staff Regulations.

In this respect, it must be underlined that in defining – and systematically revising – the above-mentioned procedural rules for ensuring the prevention of a potential detriment to the institution’s reputation, damage to the public trust in its neutrality and objectivity, as well as an actual conflict of interest of its staff members, the Commission is guided by the principle of proportionality¹⁶. Notably, so is the respective Appointing Authority when issuing its decisions on requests submitted by (former) Commission staff members pursuant to Article 12b, Article 16 and Article 40 of the Staff Regulations¹⁷.

In light of the above, the Secretariat-General concludes that the Commission’s current internal procedures concerning engagement of its staff members in occupational activities outside the institution are proportionate to the objective pursued, namely the safeguarding of the Commission against conflict of interest potentially arising from such activities. Indeed, the scrutiny of these activities falls under the remit of the respective Appointing Authority.

Consequently, the Secretariat-General does not share the view that ‘there is a clear public interest in disclosing the documents requested’, nor that ‘there is a clear risk of a conflict of interest in X’s joining the private sector so shortly after having worked at the [...] Commission’, as submitted in your confirmatory application with the aim of substantiating the necessity of having the said personal data transmitted in a public interest.

In addition, please note that personal data contained in requests submitted by (former) Commission staff members pursuant to Article 12b, Article 16 and Article 40 of the Staff Regulations are processed by the Commission in accordance with the record of processing DPR-EC-01846.1 on the requests for authorisation and various ethical statements relating to the rights and obligations of the official¹⁸. Notably, the record clearly defines, first, the purpose of the processing of the personal data concerned (which is to examine requests for authorisation and ethical statements received from (former) staff members of the Commission, assess whether the applications or declarations are compatible with the obligations laid down in the Staff Regulations and authorise those requests, possibly subject to restrictions, or refuse them)

¹⁴ Article 40 of the Staff Regulations.

¹⁵ Article 16 of the Staff Regulations.

¹⁶ Recital (3) of the decision.

¹⁷ Recital (4) of the decision.

¹⁸ Available on the Register of the Data Protection Officer at: <https://ec.europa.eu/dpo-register/detail/DPR-EC-01846.1>

and, second, the recipients of these data (who are staff members of the Commission holding specific administrative posts within the institution and having specific organisational roles or hierarchical positions in relation to the data subjects).

Therefore, as regards the justification of your request for having the personal data concerned transmitted to you, in the Secretariat's-General opinion, the above-mentioned arguments do not demonstrate the necessity for transmission of these personal data, as the Secretariat-General does not find the purpose of this transmission in the alleged public interest to be sufficiently specific, as required by Article 9(1)(b) of Regulation (EU) 2018/1725.

In this context, it must be also recalled that, as ruled by the General Court, 'general considerations', such as the requestor's belief that the personal data concerned represent a public interest, are insufficient to warrant a transmission of these data¹⁹. Likewise, so are – according to the Court of Justice – general references to 'transparency'²⁰.

Indeed, for an institution to be able to weigh up the various interests of the parties concerned by a request to transmit personal data, the necessity of such a transfer must be established by means of providing an 'express and legitimate justification or any convincing argument'²¹.

The fact that in order to further substantiate the necessity to have the personal data concerned transmitted to you, you put forward arguments of a general nature, concerning 'monitoring and public scrutiny in guaranteeing transparency, accountability and a check on possible conflict of interests', proves that the purpose for which you wish to obtain these data cannot be considered as 'specific' within the meaning of Article 9(1)(b) of Regulation (EU) 2018/1725.

In this respect, please be informed that, as regards an explicit reference in the relevant part of your confirmatory application to information on occupational activities pursuant to Article 16 of the Staff Regulations, in accordance with Article 21(7) of the decision, the Commission systematically publishes annual reports²² on how the relevant provisions regarding its former senior officials are implemented.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the Commission must assess 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 Commission must examine if 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

¹⁹ Judgment of the General Court of 23 November 2011, *Dennekamp v Parliament*, T-82/09, EU:T:2011:688, paragraphs 30-34.

²⁰ *ClientEarth v European Food Safety Authority* judgment, cited above, paragraphs 51-52.

²¹ Judgment of the Court of Justice of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, ECLI:EU:C:2010:378, paragraph 78.

²² Available at: https://commission.europa.eu/publications/occupational-activities-former-senior-officials-annual-report_en

competing interests. As already explained above, in the present case, the condition enshrined in Article 9(1)(b) of Regulation (EU) 2018/1725 is not fulfilled.

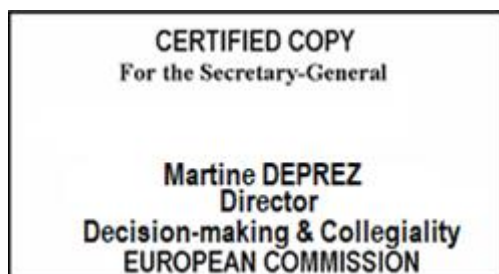
Finally, since a necessity to have the personal data transmitted to you for a specific purpose in the public interest has not been substantiated, as concerns the second part of your confirmatory application, in which you argue in favour of the disclosure of the documents requested under Regulation (EC) No 1049/2001, the Secretariat-General considers those arguments devoid of purpose.

Indeed, for the reasons explained above, the Secretariat-General reiterates that providing you with information about the existence, or not, of documents falling within the scope of your application, which is formulated in such a manner that it refers to an identified individual, would equal an unlawful transmission of the personal data concerned, which would prejudice legitimate interests of that individual, protected by Regulation (EU) 2018/1725.

3. 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