



EUROPEAN COMMISSION

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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2017/5586**

Dear Mr Hai,

I refer to your email registered on 8 November 2017, 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 ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

On 26 September 2017 you submitted the following query to the Commission:

Can you publish the travel expenses for Martin Selmayr since he was appointed to his current job with President Juncker?

Your query was considered as an application for access to documents containing the above-mentioned information and attributed to the Office for the Administration and Payment of Individual Entitlements (PMO) for handling and reply.

By letter of 19 October 2017, PMO informed you that the information requested is included in the cost statements relating to the official assignments (business trips) of the Head of Cabinet of the Commission President. It refused access to the above-mentioned

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

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

cost statements on the basis of the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001.

Through your confirmatory application, you request a review of the position of PMO.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following that review, I regret to inform you that I have to confirm the refusal of access to the information included in the documents concerned (i.e. the cost statements). The applicable exception is provided for in Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual).

The detailed reasons are set out below.

2.1 Protection of the privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that [*The 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*].

I note that in your confirmatory application, you argue that [you] *do not see it* [i.e. information requested] *as personal data, as [you are] only asking for [the Head of Cabinet of the Commission President's] travel expenses and nothing more.*

You also refer in your confirmatory application to information similar to that requested in your application, which has been released by the Commission's Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 of the TEU (TF50), with regard to the Commission's Chief Negotiator³. Consequently, in your view, the Commission should ensure the same level of transparency with regard to the Head of Cabinet of the Commission President.

According to the definition provided for in Article 2(a) of Regulation 45/2001, personal data is *any information relating to an identified or identifiable natural person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity*. Consequently, the information requested, contrary to what you argue in your confirmatory application, by its very nature constitutes personal data within the meaning quoted above. Indeed, it is not possible to *anonymise* that information, as the scope of your application is limited to a concrete and clearly identified natural person.

³ Gestdem 2017/4904.

With regard to the travel expenditure of the Chief Negotiator, I would like to underline that the information concerned was provided in the form of a general description indicating the global cost of business trips and their number. Such information also constitutes personal data within the meaning of the definition quoted above, as it relates to a concrete individual (the Chief Negotiator).

Nonetheless, in that particular case, the Commission decided to disclose the information concerned, given the political importance of the issues covered by the Chief Negotiator and the engagements taken in that area, as well as taking into account his level of seniority in the Commission's hierarchy. It needs to be underlined, however, that the information was provided outside Regulation 1049/2001. Indeed, in its reply, TF50 explained that the request for access to information relating to the Chef Negotiator was erroneously registered as an access-to-documents request under Regulation 1049/2001.

As far as your request forming the subject of this decision is concerned, as explained by PMO in its initial reply, the information requested is included in the cost statements relating to the official assignments (business trips) of the Head of Cabinet of the Commission President. These cost statements contain information directly related to the concrete individual (i.e. the Head of Cabinet of the Commission President) and therefore constitute personal data.

Public disclosure of the above-mentioned personal data, through the release of the documents (i.e. the cost statements) containing it, or through disclosure of a general description (as in case of the request relating to the Chief Negotiator), would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling⁴, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative⁵.

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the Institution concerned to determine

⁴ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.* (ECLI:EU:C:2010:378), paragraph 63.

⁵ Ibid, paragraphs 77-78.

that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject⁶.

Indeed, in the recent judgment in the *ClientEarth* case, the Court of Justice ruled that “*whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access*”⁷. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data⁸.

The EU Court has also confirmed that a mere *interest* of members of the public in obtaining certain personal data cannot be equated with a *necessity* to obtain the said data in the meaning of Regulation 45/2001⁹. Furthermore, according to the *Dennekamp* judgement, if the condition of necessity laid down by Article 8(b) of Regulation No 45/2001, which is to be interpreted strictly, is to be fulfilled, it must be established that the transfer of personal data is the most appropriate means for attaining the applicant's objective, and that it is proportionate to that objective¹⁰.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing the personal data concerned.

In any case, I do not consider that the disclosure (outside Regulation 1049/2001) of personal information regarding the Commission's Chief Negotiator may be regarded as an argument justifying disclosure of the same information concerning Commission staff members, such as the Head of Cabinet of the Commission President. The travel costs of Commission staff members are regulated by Articles 11 - 13 of Annex VII to the Staff Regulations¹¹ and are subject to the audit and control procedures. Furthermore, the Head of Cabinet is not a public office holder, but supports the Commission President in his official duties.

Furthermore, I would like to underline that the College of the Commissioners adopted, in its meeting on 12 September 2017, a draft decision amending the Code of Conduct for Members of the European Commission. The draft envisages, amongst others, the proactive publication of certain information relating to Commissioners' expenses. I consider that through the above-mentioned initiative, the appropriate level of public

⁶ Ibid.

⁷ Judgment of the Court of Justice of 16 July 2015 in case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

⁸ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

⁹ Ibid, paragraphs 107 and 108.

¹⁰ Judgment of the General Court of 15 July 2015 in case T-115/13, *Dennekamp v European Parliament*, (ECLI:EU:T:2015:497), paragraph 77.

¹¹ Staff Regulations of Officials and conditions of employment for other Servants of the EU.

transparency with regard to the travel expenditure of Commission's top policy makers will be ensured and public disclosure of the cost statements relating to the Head of Cabinet of the Commission's President, would not add anything in this context.

In the light of the above, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in the relevant costs statements cannot be considered as fulfilling the requirements of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. PARTIAL ACCESS

No meaningful partial access to the cost statements concerned is possible, as the entirety of the information falling under the scope of your application and included therein is covered by the exception in Article 4(1)(b) of Regulation 1049/2001.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation 1049/2001 is an absolute exception, i.e. its applicability does not need to be balanced against any possible overriding public interest in disclosure.

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 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



*For the Commission
Alexander ITALIANER
Secretary-General*