



EUROPEAN COMMISSION

Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 of the TEU

Deputy Chief Negotiator

Brussels, 12/10/2018
tf50(2018)5811966

By registered mail with AR

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Subject: Your request registered under *Gestdem* reference No 2018/4790

Dear Ms Peterson,

We refer to your e-mail dated 11/09/2018, registered on 12/09/2018 under the above-mentioned reference number, by which you made a request pursuant to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents¹.

You requested "all correspondence (including emails) between Michel Barnier (or his private staff) and Dominic Raab (or his private staff), relating to requests for additional face-to-face meetings, between 1 August–29 August 2018."

After consultation of the third party in accordance with Article 4(4) of Regulation 1049/2001, and taking into account the position of the third party, we have to inform you that the requested correspondence cannot be disclosed as it is subject to exceptions laid down in Article 4(1)(a), third indent of Regulation 1049/2001 (protection of the public interest as regards international relations) and Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual). The detailed reasons for the refusal are set out hereafter.

¹ Official Journal L145 of 31.05.2001, p.43.

Protection of the public interest as regards international relations

Article 4(1)(a), third indent of Regulation 1049/2001 provides that the ‘institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations [...]’.

The General Court has acknowledged that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’.²

The requested correspondence relates to the drafting of programmes with the specific topics covered in the context of the negotiations on the United Kingdom’s orderly withdrawal from the European Union and the framework for the future relationship between the European Union and the United Kingdom, in accordance with Article 50 of the Treaty on European Union.

The level of details covered in the requested correspondence goes beyond what was jointly agreed as public documents in the Terms of Reference for the Article 50 TEU negotiations³.

Releasing such information could undermine the working relations between the EU and UK negotiators by constraining the ability of both sides to exchange draft proposals and test possible options. This would inevitably limit the scope to plan effective future negotiating sessions for fear that such specific details could be made public.

Public disclosure of the requested correspondence would risk damaging the negotiating process by revealing sensitive details and jeopardising the successful outcome of the negotiations. This would clearly undermine the public interest as regards international relations.

The EU and UK negotiators need to preserve a ‘safe space’ for preliminary exchanges, which is an inherent feature of preparing and conducting international negotiations.

Indeed, the General Court has acknowledged ‘that initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive, and that public participation in the procedure relating to the negotiation

² Judgment of 25 April 2007 of the General Court, at the time Court of First Instance, in Case T-264/04, *WWF European Policy Programme v Council of the EU*, EU:T:2007:114, paragraph 40.

³ https://ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf

and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations.⁴

Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that ‘access to a document is refused 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 the *Bavarian Lager* case⁵, the Court of Justice stated that Article 4(1)(b) ‘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 Regulation No 45/2001’⁶.

Article 2(a) of Regulation 45/2001 provides that personal data ‘shall mean any information relating to an identified or identifiable person [...]’. As the Court of Justice confirmed in *Rechnungshof* case, ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’⁷.

The requested correspondence contains information such as names, functions, descriptions of areas of responsibility and contact details of staff members of the Commission as well as the UK's delegates involved in the negotiations.

This information clearly constitutes personal data in the sense of Article 2(a) of Regulation 45/2001.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

Pursuant to Article 8(b) of Regulation 45/2001, the European Commission can only transmit personal data to a recipient subject to Directive 95/46/EC 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 cumulative⁸.

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

⁴ Judgment of 11 July 2018, *Client Earth v Commission*, quoted above, paragraph 56.

⁵ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

⁶ Quoted above, paragraph 59.

⁷ Judgment of 20 May 2003 in Joined Cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, EU:C:2003:294, paragraph 73.

⁸ Judgment of 29 June 2010, *Bavarian Lager*, quoted above, paragraphs 77-78.

In its judgement in the *ClientEarth* case, the Court of Justice ruled that the institution does not have to examine of its own motion the existence of a need for transferring personal data⁹. In the same ruling, the Court stated that if the applicant has not established a need to obtain the personal data requested, the institution does not have to examine the absence of prejudice to the person's legitimate interests¹⁰.

Against this background, 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 in the correspondence, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

Furthermore, there is a real and non-hypothetical risk that public disclosure of the personal data reflected in the correspondence would harm the privacy of the data subjects and subject them to unsolicited external contacts.

In case you would disagree with this assessment, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to introduce a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Sabine Weyand

⁹ Judgment of 16 July 2015 in Case C-615/13 P, *ClientEarth v European Food Safety Agency*, EU:C:2015:489, paragraph 47.

¹⁰ *Ibid*, paragraphs 47-48.