



EUROPEAN COMMISSION

Brussels, 11.3.2020
C(2020) 1671 final

Mr David Churchill
Rue de Laeken 59
1000 Brussels
Belgium

**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 2019/5451**

Dear Mr Churchill,

I refer to your e-mail of 21 January 2020, registered on 22 January 2020, 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’).

Please accept our apologies for the delay in the handling of your application.

1. SCOPE OF YOUR REQUEST

In your initial application of 2 August 2019, you requested access to, I quote, ‘documents/data which details the total travel costs, and also costs of expenses while travelling, for chief Brexit negotiator Michel Barnier in relation to all his missions so far for this year (2019), and for last year (2018) and 2017’. You pointed out that your request concerns ‘documents/data which details every single mission he has been on for the said years above’. In your application of 2 August 2019, you also specified that your request covers documents concerning the missions of Mr Barnier until that date (‘in relation to **all his missions so far for this year (2019)**’ emphasis added).

You requested the European Commission to ‘clearly show for each mission:

- where each mission was to (which country and which city);

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

- the date the mission started and finished;
- whether Mr Barnier took a commercial flight (if this is the case please provide the total cost of the ticket and whether it was first class, business class or standard class or any other class) or whether he took an air taxi (if so please supply the total cost of chartering each air taxi);
- the name of the hotel he stayed in during each mission and the total cost of the stay;
- [...] all other costs incurred on each of the missions, including all food and drink (all subsistence and the amounts spent on this). In the event any missions involve costs for restaurants or bars, please detail how much the bill was in each restaurant or bar and the name of the restaurant/bar’.

The European Commission’s Office for the Administration and Payment of Individual Entitlements, which dealt with your request at the initial level, refused access to the documents falling within the scope of your request based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You state that ‘at the very minimum, details of the number of missions and the costs of those missions should be shared publicly and transferred over’. You point out that you have ‘modified your request’, which would be now circumscribed to, I quote, ‘documents and/or data which clearly show the total mission costs of Mr Barnier, showing clearly for each mission:

- where each mission was to (which country and which city);
- the date the mission started and finished;
- whether Mr Barnier took a commercial flight, and the total cost of the ticket and whether it was first class, business class or standard class or any other class, or whether he took an air taxi and the total cost of chartering each air taxi overall (not per person cost) taken by him;
- the total cost of hotel/accommodation costs for each mission for him;
- all other costs incurred on each of the missions, including all food and drink or the total amount for subsistence’.

You clarify that, ‘[a]s in my original request, I would like to have this information on all Mr Barnier’s missions for the calendar years 2019, 2018 and 2017. If your position is that providing this information for three calendar years is too broad a period, please just provide it for the years 2019 and 2018’.

In view of this and considering the large number of documents concerned by your request, the scope of this confirmatory review is limited to the assessment of documents related to the period between 1 January 2018 and 2 August 2019 (date of your initial

request). The arguments you put forward in your confirmatory application have been taken into account in my assessment, set out 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 can inform you that the European Commission has identified the following categories of documents as falling under the scope of your application:

- 109 mission summaries relating to the missions of Mr Barnier stated in your application;
 - 66 supporting documents concerning accommodation;
 - 41 supporting documents concerning transport;
 - 17 supporting documents concerning exchanges with travel agency;
 - 62 supporting documents concerning miscellaneous costs;
 - 26 other supporting documents.

These documents pertain to the categories indicated above based on the type of information they contain. In particular, all mission summaries contain information about Mr Barnier, the exact dates and duration of the business trip, the destination, the amounts spent on travel, accommodation, subsistence and other information, such as miscellaneous costs. The supporting documents correspond to the incurred expenses in each one of the respective categories of expenses.

Following my assessment, I regret to inform you that I have to confirm the initial decision of the Office for the Administration and Payment of Individual Entitlements to refuse access to the documents based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning my assessment are detailed 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.

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 a recent judgment, the General Court confirmed that, in addition to names, information concerning the professional or occupational activities of a person can also be regarded as personal data where, first, the information relates to the working conditions of the said person and, second, the information is capable of indirectly identifying, where it can be related to a date or a precise calendar period, a physical person within the meaning of the Data Protection Regulation⁸.

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.

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 Judgment of the General Court of 27 November 2018, *VG v European Commission* (hereafter referred to as ‘*VG v European Commission*’ judgment), Joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 64.

The requested documents contain personal data, namely information relating to an identified natural person in relation to various costs incurred during his missions for the period between 1 January 2018 and 2 August 2019. In addition, they contain the personal data, such as names and surnames, of European Commission staff not holding any senior management position. The names⁹ of the persons concerned, as well as the information regarding the details on mission costs are data from which the identity of the persons concerned can be deduced. They constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

In your confirmatory application, you do not generally contest that the documents pertaining to your request contain personal data. In fact, you acknowledge that ‘naming individual hotels, restaurants or bars as part of my request may strain into the domain of personal data’. Nevertheless, I would like to outline, for the reasons set out below, that the type or types of costs related to the missions of Mr Barnier are indeed personal data, as this information cannot be disassociated from the natural persons it concerns.

In the *Nowak* judgment¹⁰, the Court of Justice 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.’

It is obvious that information about costs incurred by Mr Barnier during the missions in question is information which, by reason of its content, is linked to particular natural persons. In the *VG v European 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 information¹¹. In the present case, a clear link to identified and/or identifiable persons remains, since your request concerns the Head of Task Force for Relations with the United Kingdom and the costs related to his missions. It is not possible to redact the names or surnames of the natural person concerned, and only leave the breakdown of the costs, as the whole information continues to relate to an identified and/or identifiable natural person.

In other words, the information contained in the documents you seek to obtain does not cease to be personal data because it relates to the Head of Task Force for Relations with the United Kingdom. Your request does not concern a document where the name of Mr Barnier is merely mentioned, but documents containing personal data which are intrinsically connected with this person. In full compliance with Regulation (EC) No

⁹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹⁰ 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.

¹¹ *VG v European Commission* judgment, cited above, paragraph 74.

1049/2001, an individual assessment of the requested documents has to be performed taking into account the data protection parameters stipulated in Regulation (EU) 2018/1725.

In the recent *Psara* ruling, which concerned the expenditure incurred by Members of the European Parliament, in particular disclosure of documents showing details regarding how and when [...] MEPs' from each Member State 'spent', during various periods, the General Court concluded that 'it is apparent [...] [that] all the requested documents contain personal data, so that the provisions of Regulation No 45/2001 are applicable in their entirety to the present case'¹². This case concerned members of a European institution and details on the expenditure they incurred. I consider the findings of the General Court as directly relevant to the present case. The General Court did not only conclude that the requested documents obviously contained personal data, but also confirmed the decision of the European Parliament to refuse access to these documents.

In this same judgment, the General Court stated that 'the fact that data concerning the [MEPs] in question are closely linked to public data on those persons, inter alia as they are listed on the Parliament's internet site, and are, in particular, MEPs' names does not mean at all that those data can no longer be characterised as personal data, within the meaning of Article 2(a) of Regulation No 45/2001'¹³.

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 data¹⁴. 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

¹² Judgment of the General Court of 25 September 2018, *Maria Psara and Others v European Parliament* (hereafter referred to as '*Psara v European Parliament* judgment'), Joined Cases T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraph 52.

¹³ *Ibid.*

¹⁴ 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 put forward several arguments to justify why a transmission of the personal data should take place.

Firstly, you argue that Mr Barnier 'is very much considered by European citizens, voters and politicians to be carrying out a very high-profile public duty – namely, negotiating a good deal for the European Union and its citizens in relation to Brexit and the EU's future relationship with Great Britain. Indeed, Mr Barnier often stands alongside politicians and public office holders at press conferences and often gives interviews to media outlets as part of his role due to its public nature'. You add that '[Mr Barnier] is a public, not a private, figure in the eyes of Europeans and therefore is expected to be open and transparent with the public and with voters about his work and what it entails. Indeed, Mr Barnier himself has often stressed the importance of "transparency" in and behind his work'.

Secondly, you state that 'there is in fact great public interest in knowing this information and any potential wider impacts it may or may not have on other EU policies (for instance, the potential conflict between taking private jets and EU green policies). It is also in the public interest for European citizens to be assured that all costs relate to the public duty he has been asked – and that he accepted – to carry out'. You underline that 'the principles of transparency and openness in relation to administration costs and the carrying out of public duties are bigger than any one individual, including Mr Barnier. Which is why the costs of missions undertaken by commissioners are publicly published on the commission website'.

I would like to underline that the European Commission proactively publishes information about the expenses of its Members. However, no such rule exists for the Head of Task Force for Relations with the United Kingdom, whose status is different to the one of Commissioners. As Mr Barnier is senior official within the European public administration, his status is not the same as the status of Commissioners for whom the Code of Conduct for the Members of the European Commission applies. Indeed, as a Commission staff member, the Head of Task Force for Relations with the United Kingdom is not subject to the same rules as Member of the College. The travel costs of any staff member of the European Commission are regulated by Articles 11 - 13 of Annex VII to the Staff Regulations¹⁵ and the Commission Decision on the general provisions for implementing Articles 11, 12 and 13 of Annex VII to the Staff Regulations of Officials (mission expenses) and on authorised travel Guide to missions and

¹⁵ Staff Regulations of Officials and conditions of employment for other Servants of the European Union.

authorised travel. It has to be noted that this document, which is known as the ‘Mission Guide’ is publicly available¹⁶.

Furthermore, even for public figures, such as Members of the European Parliament, the General Court has acknowledged that the choice of public figures to expose themselves to scrutiny by third parties, particularly the media and, through them, by a lesser or greater general public, ‘in no way implies that their legitimate interests must be regarded as never being prejudiced by a decision to transfer data relating to them’¹⁷.

Furthermore, I consider that your arguments on transparency stipulated above, which are general in nature, do not establish sufficiently that it is necessary to have the data transmitted to you for a specific purpose in the public interest. The General Court has rejected similar arguments put forward in the *Psara v European Parliament* judgment, where the applicants stated various objectives pursued by their requests for access to documents, namely, on the one hand, to enable the public to verify the appropriateness of the expenses incurred by Members of the European Parliament in the exercise of their mandate and, on the other hand, to guarantee the public right to information and transparency. The General Court stated that ‘because of their excessively broad and general wording, those objectives cannot, in themselves, establish the need for the transfer of the personal data in question’¹⁸. It also concluded that ‘the wish to institute public debate cannot suffice to show the need for the transfer of personal data, since such an argument is connected solely with the purpose of the request for access to the documents’¹⁹.

These findings are applicable to the case at hand, as the new Regulation (EU) 2018/1725 puts the burden of proof on the recipient who has to demonstrate the existence of the necessity of the transmission of the data for a specific purpose in the public interest.

Having carefully examined the arguments you put forward in your confirmatory request, however, I must conclude that they are not sufficient to establish that the conditions of Article 9 of Regulation (EU) 2018/1725 are fulfilled. The above arguments do not establish any pressing need to obtain the personal data of Mr Barnier, notably when the information you request, including the breakdown of the mission expenses, does not pertain to a Member of the College. The nature and the relevance of the functions of the Head of Task Force for Relations with the United Kingdom do not undermine this conclusion.

As you have not demonstrated that the transfer you request can be considered as a lawful processing nor have you established the necessity to have the data transmitted for a specific purpose in the public interest, the European Commission does not have to

¹⁶ C(2017) 5323, available at: <https://ec.europa.eu/transparency/regdoc/?fuseaction=list&coteId=3&year=2017&number=5323&language=EN>.

¹⁷ Judgement of the General Court of 15 July 2015, *Gert-Jan Dennekamp v European Parliament*, T-115/13, EU:T:2015:497, paragraph 119.

¹⁸ *Psara v European Parliament*, cited above, paragraph 74.

¹⁹ *Ibid*, paragraph 90.

examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

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 public disclosure would harm their privacy and integrity.

Please note also that Article 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.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, 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. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting 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 exception to the right of public access.

4. 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