



EUROPEAN COMMISSION

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Ms Aisha Down
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Romania

**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 2019/5140**

Dear Ms Down,

I refer to your e-mail of 1 January 2020, registered on 3 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’).

1. SCOPE OF YOUR REQUEST

In your initial application of 4 September 2019, addressed to the Directorate-General for Health and Food Safety, you requested access to, I quote:

- ‘[a]ll details, correspondence and minutes relating to meetings between DG Sante and Everis since 1 May 2013;
- [a]ll contracts made between DG Sante and Everis since 1 May 2013;
- [a]ll details, correspondence and minutes relating to meetings between DG Sante and representatives of ATOS, De La Rue, IBM, Honeywell, Allexis, and other companies involved in the secure printing industry or IT solutions for traceability since 1 May 2013’.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

The European Commission identified 70 documents falling within the scope of your request. For your convenience, please find enclosed the list of documents identified, also attached to the Directorate-General for Health and Food Safety's reply of 5 December 2019.

In its initial reply, the Directorate-General for Health and Food Safety granted, upon consultations with the third parties concerned in accordance with Article 4(4) of Regulation (EC) No 1049/2001, full access to documents 1-35 and partial access to documents 36 and 39-70, based on the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001. It refused access to documents 37 and 38 pursuant to the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

In your confirmatory application, you contest, I quote: '[the European Commission's initial decision] not to release documents 37 and 38, the e-mail on the Implementation Study, and the additional comments from Inexto'. In your view, these documents are not covered by the exception provided for under the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001.

Consequently, the scope of this confirmatory review is limited to the assessment of the initial decision as regards:

- E-mail exchanges between De La Rue plc and Everis, 16 March – 31 July 2017, reference Ares(2019)6662905 ('document 37'); and
- e-mail from Inexto to the Directorate-General for Health and Food Safety, 15 December 2016, reference Ares(2019)6662840 ('document 38').

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.

In the context of the confirmatory review, the European Commission's Secretariat-General re-consulted the third parties authors of documents 37 and 38 in accordance with Article 4(4) of Regulation (EC) No 1049/2001. In response to these consultations, De La Rue plc and Everis agreed with the disclosure of the parts of document 37 originating from them, subject to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

As regards document 38, the European Commission's Secretariat-General did not obtain a reply to its consultation within the prescribed deadlines. However, it considers that, with the exclusion of personal data, disclosure of the content of this document would not undermine any of the interests protected by the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001.

Therefore, I can inform you that partial access is granted to documents 37 and 38, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

The reasons underpinning my assessment are set out 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 [...]'.

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.

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.

Documents 37 and 38 contain personal data such as the names, surnames, e-mails, telephone numbers and addresses of third party representatives and persons who do not form part of the senior management of the European Commission. The names⁸ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

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 data⁹. 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 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 do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects’ legitimate interests might be prejudiced.

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

⁹ 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.

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 such public disclosure would harm their privacy and subject them to unsolicited external contacts.

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. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

In your confirmatory application, you argue that '[...] there is overwhelming public concern in these documents being released'. However, please note that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents falling under your confirmatory application.

As mentioned above, partial access is granted to documents 37 and 38 with only personal data redacted on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001. For the reasons explained in Section 2.1 above, no meaningful further partial access is possible without undermining the protection of privacy and the integrity of the individuals concerned.

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

Yours sincerely,



For the Commission
Ilze JUHANSONE
Secretary-General

Enclosures: (3)