



EUROPEAN COMMISSION

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OUT OF SCOPE

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

**Subject: Your confirmatory application for access to documents under
Regulation No 1049/2001 - GESTDEM 2018/4613**

Dear [REDACTED],

I refer to your e-mail of 30 October 2018, registered on the same day, 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 (hereafter, Regulation No 1049/2001).

1. SCOPE OF YOUR REQUEST

In your initial application of 29 August 2018, registered under the reference number GestDem 2018/4613 and dealt with by the Directorate-General for Communications Networks, Content and Technology, you requested access to the following documents:

- '[a]ll documents related to the meeting [held on 20 January 2016] between [C]ommissioner Günther Oettinger and the Boston Consulting Group GmbH, including but not limited to minutes (hand-written) notes, audio recordings, verbatim reports, e-mails, and presentations;
- all documents related to the meeting [held on 19 October 2017] between [REDACTED] OUT OF SCOPE [REDACTED] and 5G Automotive Association, including but not limited to

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

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

minutes, (hand-written) notes, audio recordings, verbatim reports, e-mails, and presentations;

- all documents related to the meeting [held on 8 December 2017] between [REDACTED] OUT OF SCOPE [REDACTED] and Mobivia, including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, e-mails, and presentations;
- all documents related to the meeting [held on 24 January 2018] between [REDACTED] OUT OF SCOPE [REDACTED] and Scania, including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, e-mails, and presentations;
- all documents related to the meeting [held on 20 February 2018] between [REDACTED] OUT OF SCOPE [REDACTED] and Scania, including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, e-mails, and presentations;
- all documents related to the meeting [held on 20 March 2018] between [REDACTED] OUT OF SCOPE [REDACTED] and Qualcomm, including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, e-mails, and presentations.'

In its initial reply dated 23 October 2018, the Directorate-General for Communications Networks, Content and Technology identified 17 documents as falling under the scope of your request.³ After examining these documents and following consultations with the third parties concerned, it grouped them into four sections, as follows:

- A) documents to which full access was granted (Documents 2, 3, 9 and 10);
- B) documents to which partial access was granted, subject only to the redaction of personal data based on Article 4(1)(b) of Regulation No 1049/2001 (protection of privacy and the integrity of the individual) (Documents 1, 7, 11, 12, 13 and 16);
- C) documents that were partially disclosed on the grounds of Article 4(2), first indent, of Regulation No 1049/2001 (protection of commercial interests) and Article 4(3), second subparagraph, of the same Regulation (protection of the decision-making process) (Documents 4, 6, 14 and 17). Certain parts of these documents were also redacted as they contained personal data.
- D) documents that were not disclosed, pursuant to Article 4(1)(b) and 4(2), first indent, of Regulation No 1049/2001 (Documents 5, 8 and 15).

In your confirmatory application, you request a review of the position of the Directorate-General for Communications Networks, Content and Technology only with regard to the documents listed in sections C and D. The scope of this confirmatory decision is therefore limited to documents 4 to 6, 8, 14, 15 and 17.

³ See pages 2 and 3 of the initial decision.

The arguments that you put forward in support of your request have been taken into account in the assessment and are addressed below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the relevant Directorate-General at the initial stage.

During the confirmatory stage, the Secretariat-General of the European Commission re-consulted relevant third parties on this request.

Following this review and taking into account the outcome of the consultations, I can inform you that wider partial access is granted to the following documents:

- Document 4 ('Mail dated 2/10/2017', reference Ares(2017)4788484), subject only to the redaction of personal data in accordance with Article 4(1)(b) of Regulation No 1049/2001;
- Document 6 ('BTO Meeting the 5GAA', reference Ares(2018)4604437). The undisclosed parts of this document are covered by the exception relating to the protection of privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation No 1049/2001;
- Document 14 ('CAB Gabriel meeting Scania Board', reference Ares(2018)4607322), subject only to the redaction of personal data in accordance with Article 4(1)(b) of Regulation No 1049/2001;
- Document 17 ('BTO **OUT OF SCOPE** meeting with Qualcomm', reference Ares(2018)1623567). The undisclosed parts of this document are covered by the exceptions protecting commercial interests and privacy and the integrity of the individual, provided for respectively in the first indent of Article 4(2) and in Article 4(1)(b) of Regulation No 1049/2001.

I would like to underline that documents 6, 14 and 17 were drawn up by the European Commission services for internal use only and they reflect solely the interpretation of their author(s) regarding the views and positions expressed during the meetings. These documents do not therefore set out any official position of the third parties concerned.

In addition, full access is granted to document 5 ('5GAA Presentation', reference Ares(2018)4604307). Please note that this document was received from a third party and cannot be re-used without the agreement of its author.

Please find the above-referred documents attached.

With regard to documents 8 and 15, I wish to inform you that I confirm the position of the Directorate-General for Communications Networks, Content and Technology, for the reasons set out below.

2.1. Protection of commercial interests of a natural or legal person

Article 4(2), first indent, of Regulation No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure’.

Document 17 concerns a meeting between the services of the European Commission and a representative of a telecommunications company, which took place on 20 March 2018. Parts of this document have been redacted as they contain sensitive business information about a third party, such as its joint commercial strategy with other private entities, its business activity and information on competition files. Please note that the undisclosed parts of the document reflect the outcome of the consultation with the third party in question.

If publicly released, the above-mentioned information would seriously undermine the commercial interests of the private entity concerned, as it would place in the public domain sensitive information that could be used by competitors, thereby harming its position in the market. Other parties would gain access to confidential information about its business and commercial activities, thereby gaining an unfair competitive advantage that could undermine the competitiveness of this private entity.

Therefore, there is a real and non-hypothetical risk that the public release of the relevant withheld parts of the above-mentioned documents would undermine the commercial interests of a third party.

Please note that, given the limited volume of the redacted parts, it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing their content and, thereby, depriving the exception of its very purpose.⁴

In light of the above, I consider that the use of the exception under Article 4(2), first indent, of Regulation No 1049/2001 on the grounds of protecting commercial interests of a natural or legal person is justified, and that access to the relevant undisclosed parts of document 17 must be refused on that basis.

2.2. Protection of privacy and the integrity of the individual

Pursuant to Article 4(1)(b) of Regulation No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

⁴ Please see in this respect: Judgment of 24 May 2011, *NLG v Commission*, T-109/05 and T-444/05, EU:T:2011:235, paragraph 82. See also Judgment of 8 February 2018, T-74/16, *Pagkyprios organismos ageladotrofon v Commission*, EU:T:2018:75, paragraph 71.

The applicable legislation in this field is Regulation (EC) No 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 No 2018/1725).

In your confirmatory application, you point out that you are not requesting access to personal data such as ‘names, [signatures] and contact details’. However, you ask the European Commission to review specifically the decision of the Directorate-General for Communications Networks, Content and Technology not to give access to documents 8 and 15 on the grounds of Article 4(1)(b) of Regulation No 1049/2001.

Hence, I understand that you do not contest the decision of the Directorate-General concerned to redact the names, handwritten signatures and contact details of the European Commission staff or external staff in documents 4, 6, 14 and 17. With regard to document 17, please note, however, that the name of the representative of the telecommunication company is herewith disclosed, as the person concerned was consulted on this matter and agreed that this data be publicly released.

I now address your arguments regarding the remaining documents that were withheld pursuant to the above-mentioned exception, namely documents 8 and 15.

Documents 8 and 15 are handwritten notes of meetings held by the European Commission services with representatives of 5GAA and Scania, respectively. Both documents were drawn up during the meetings by staff members of the European Commission and contain biometric data of the persons concerned. They thus constitute personal data in the sense of Article 3(1) of Regulation No 2018/1725, which defines it as ‘any information relating to an identified or identifiable natural person [...]’.

Indeed, the Court of Justice has specified that any information, which by reason of its content, purpose or effect is linked to a particular person, is to be considered as personal data.⁶

In its judgment in Case C-28/08 P (*Bavarian Lager*)⁷, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.⁸

Pursuant to Article 9(1)(b) of Regulation No 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies

⁵ Official Journal L 205 of 21.11.2018, p. 39.

⁶ Judgment of 20 December 2017, *Peter Novak v Data Protection Commissioner*, C-434/16, request for a preliminary ruling, EU:T:2018:560, paragraphs 33-35.

⁷ Judgment of 29 June 2010, *Commission v the Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378.

⁸ Whereas this judgment specifically related to Regulation 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 data, the principles set out therein are also applicable under the new data protection regime established by Regulation No 2018/1725.

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 No 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation No 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 has established 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 argue that the non-disclosure of the handwritten notes 'can set a dangerous precedent towards opacity', as the European Commission could prevent disclosure of other documents in the future by ensuring that they 'exist only as handwritten documents'. You also state that the risk that disclosure of the notes would harm the legitimate interest of the persons concerned is negligible in view of the large number of staff employed by the Directorate-General concerned.

Following an examination of documents 8 and 15, and having regard to your above-referred arguments, I conclude that the need to have the personal data transferred is not justified in this case.

As the Directorate-General for Communications Networks, Content and Technology outlined in its initial reply, the content of the handwritten notes (documents 8 and 15) corresponds to the content of the relevant meeting minutes (documents 6 and 14, respectively). The information contained therein is short-lived and has a merely transitory value as it is essentially reflected in the minutes that were prepared following the meetings.

Moreover, I note that the Directorate-General for Communications Networks, Content and Technology gave partial access to documents 6 and 14. I would like to underline that, in addition, further partial access is herewith granted to these documents, with only limited parts redacted on the grounds of the protection of privacy and the integrity of the individual.

Hence, the content of the handwritten notes is reflected in other (non-handwritten) documents to which wide (partial) access has been granted.

In light of the above, I consider that the public release of documents 8 and 15 would go beyond what is necessary for attaining the objective of transparency in relations between interest representatives and policymakers and would therefore be disproportionate to that purpose.

Since the conditions laid down in Article 9(1)(b) of Regulation No 2018/1725 are cumulative, there is no need to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced if the personal data were to be disclosed.

Nevertheless, please note that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation No 1049/2001, access cannot be granted to the personal data that you seek to obtain, as the need to obtain access thereto for a purpose in the public interest has not been determined and it cannot be assumed that the legitimate rights of the individuals concerned would not be prejudiced by the disclosure.

Consequently, access to documents 8 and 15 must be refused on this basis.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that the European Commission should balance the interest protected under the exceptions against the 'public interest to know how corporate lobbyists attempt to influence [European Union] legislation and policymaking about connected cars and autonomous vehicles'. You also state that 'since autonomous vehicles can bring both opportunities as well as risks for the health of citizens, the public interest is great'.

While I agree that there can be a public interest in knowing how interest groups and other stakeholders interact with public representatives, this public interest has, in my view, been fulfilled by the wide access to the documents that is herewith granted.

Concerning the undisclosed parts of document 17, I consider that, in this case, such an interest does not outweigh the public interest in safeguarding the commercial interests that, as explained in section 2.1, warrant protection under Article 4(2), first indent, of Regulation No 1049/2001.

Please also be informed that the applicability of the exception in Article 4(1)(b) of Regulation No 1049/2001 does not need to be weighed against any possible overriding public interest in disclosure.

4. PARTIAL ACCESS

As indicated above, further partial access is herewith granted to documents 4, 6 and 14, with only the personal data redacted. Document 5 is herewith fully released.

With regard to document 17, no meaningful further partial access is possible as virtually all parts of this document are herewith disclosed. As explained in section 2.1 above, the redacted parts are protected by Article 4(2), first indent, (protection of commercial interests).

With regard to the remaining documents falling under your confirmatory request, I have considered the possibility of granting partial access in accordance with Article 4(6) of Regulation No 1049/2001. As explained under section 2.2, documents 8 and 15 contain biometric data pertaining to staff members of the European Commission. Taking into account the considerations included under that section, no partial access to these documents is possible, as they are covered in their entirety by the exception laid down in Article 4(1)(b) of Regulation No 1049/2001. Access must therefore be fully refused on this basis.

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 European Commission
Martin SELMAYR
Secretary-General

Enclosures: (5)