



EUROPEAN COMMISSION

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Mr Olivier Hoedeman
Corporate Europe Observatory
Rue d'Edimbourg 26
1050 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 2020/2580**

Dear Mr Hoedeman,

I refer to your letter of 11 June 2020, registered on 12 June 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 6 May 2020 you requested access to the following documents, I quote:⁴

- Minutes, notes and other records from the following meetings (listed on the Commission's website and on Integritywatch.eu):
- 23/01/2020: Juraj Nociar (member of Maroš Šefčovič's cabinet) meeting with Philip Morris International Inc. (PMI). Subject: "Working priorities of the new European Commission"
- 01/10/2018: Kyriacos Charalambous, then member of Johannes Hahn's cabinet , meeting British American Tobacco (BAT). Subject: Meeting to discuss economic climate and business environment in Kosovo .

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

- 09/11/2017: Eduard Hulicius, then member of Věra Jourová's cabinet, meeting with Philip Morris International Inc. (PMI). Subject: new technologies diminishing harm to tobacco user
- 26/01/2017: Lubomira Hromkova, then member of Maroš Šefčovič's Cabinet, meeting with Philip Morris International Inc. (PMI). Subject: Energy Union, Occasion of the Slovak New Year Concert.'

Your initial application was split into four cases with the following references: GESTDEM 2020/2580, GESTDEM 2020/2581, GESTDEM 2020/2582 and GESTDEM 2020/2583.

The request GESTDEM 2020/2580 was handled by the Secretariat-General which identified the following documents as falling under the scope of your request:

- E-mail from Agentura MCP sent to Mr Nociar on 13 January, registered under reference ARES(2020)10911 (hereafter: 'document 1');
- E-mail from Agentura MCP sent to Mr Nociar on 17 January, registered under reference ARES(2020)1091287 (hereafter: 'document 2');
- Attachment to the e-mail from Agentura MCP sent to Mr Nociar on 17 January, registered under reference ARES(2020)1091287 (hereafter: 'document 3');
- Meeting notes from meeting with Philip Morris held on 23 January 2020, registered under reference ARES(2020)1091363 (hereafter: 'document 4').

In its initial reply of 25 May 2020, the Secretariat-General granted a wide partial access to the documents requested, subject to the redaction of personal data 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.

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 Commission department at the initial stage.

Following this review, I can inform you that wider partial access is granted to documents 1 and 3.

As regards the redacted parts of documents 1, 2, 3 and 4, I confirm the initial decision of the Secretariat General to refuse access, based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001, for the reasons 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 [...]'.

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.

The requested documents contain personal data such as the names, e-mail addresses, phone numbers and job titles of persons who do not form part of the senior management

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.

of the European Commission. The documents requested contain also the names and titles of the representative of external companies.

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 data.⁹ 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 mention that ‘to be able to interpret the meaning of these documents, it is necessary to know who sent the emails.’ You also mention that the representatives of Phillip Morris ‘represented the company in a professional and official capacity. Their names should therefore not be considered ‘personal data’, but information that should be available to the public, for instance to identify possible conflicts of interest.’

According to the Dennekamp judgement, if the condition of necessity laid down by Article 8(b) of Regulation (EC) 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

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.

means for attaining the applicant's objective, and that it is proportionate to that objective.¹⁰

As a preliminary comment, I would like to underline that the right to the protection of privacy is recognised as one of the fundamental rights in the Charter of Fundamental Rights, as is the transparency of the processes within the EU institutions. The legislator did not give any of these two rights primacy over each other, what is confirmed by the Bavarian Lager judgment, referred to above.

The European Commission granted (wide) partial access to the documents requested. Indeed, it publically disclosed their substantive content. It needs to be emphasised that the documents disclosed under Regulation (EC) No 1049/2001, legally speaking, become public documents, as the access is granted to the public at large. Consequently, in the view of the European Commission, the general need of public transparency with regard to the contacts between the European Commission and Phillip Morris has been ensured. It is unclear, how and in what manner public disclosure of personal data included in the documents concerned would add to that transparency. On the other hand, such disclosure would undermine the privacy of the individual concerned. As already mentioned above, the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*) that there is no reason of principle to justify excluding activities of a professional nature from the notion of private life.

In the light of the above, I consider that the transfer of the personal data of the representatives of the third parties concerned would go beyond what is necessary for attaining your objective and is therefore disproportionate to the purpose of ensuring the transparency of the relations between the staff members of the European Commission and the external actors.

I conclude that the transfer of that personal data through the disclosure of the above-mentioned documents cannot be considered as fulfilling the requirements of Regulation (EU) 2018/1725. In consequence, the use of the exception under Article 4(1)(b) of Regulation (EC) No 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. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note also 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.

¹⁰ Judgement of the General Court of 15 July 2015, *Dennekamp v European Parliament*, Case T-115/13, ECLI:EU:T:2015:497, paragraph 77.

4. PARTIAL ACCESS

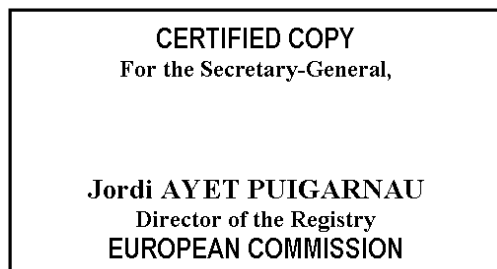
In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting further partial access to the documents requested.

As explained above, wider partial access is granted to documents 1 and 3. As regards the redacted parts of documents 1, 2, 3 and 4, I confirm the initial decision of the Secretariat General to refuse access to personal data, based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. For the reasons explained above, no meaningful further partial access can be granted to these documents without undermining the interests described above.

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: (4)