



EUROPEAN COMMISSION

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C(2020) 7409 final

Ms Margarida Da Silva  
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1050 Bruxelles

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2020/3792**

Dear Ms Da Silva,

I refer to your letter of 24 July 2020, registered on 27 July 2020, by 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 documents<sup>2</sup> (hereafter 'Regulation (EC) No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

On 18 May 2020 you submitted an initial application, in which, I quote, '[you requested access to]':

- All documents - including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, operational conclusions, lines to take, e-mails, and presentations related to the meetings Commissioner Breton and members of his Cabinet have held with interest representatives since 1 March 2020;

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

- All correspondence (i.e. any emails, correspondence, telephone call notes, and/or text messages including WhatsApp exchanges) between Commissioner Breton and members of his Cabinet have held with interest representatives since 1 March 2020.

Your application was attributed to the Directorate-General for Communications Networks, Content and Technology (Gestdem 2020/2996). It informed you on 12 June 2020 that your application covers a large number of documents and referred to Article 6(3) of Regulation (EC) No 1049/2001, which provides for a possibility to confer with an applicant informally with a view to finding a fair solution. Indeed, the Directorate-General for Communications Networks, Content and Technology proposed that the scope of your initial application be reduced, so that it can be handled within the statutory time limits.

On 19 June 2020 you agreed that the scope of your initial application is limited to documents concerning 20 meetings of your choice. In this context, you provided the list of the meetings. The documents relating to these meetings are held by various Directorates-General of the European Commission and therefore your application was split between the Directorate-General for Communications Networks, Content and Technology (Gestdem 2020/2996), the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (Gestdem 2020/3792) and the Directorate-General for Defence Industry and Space (Gestdem 2020/3793). Each of the Directorates-General provided the separate reply relating to the documents in its possession.

The Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs identified 38 documents falling under the scope of your initial application<sup>3</sup> and on 15 July 2020 provided you the reply in which it:

- granted wide partial access to 33 documents, with only personal data redacted based on the exception in Article 4(1)(b) of Regulation (EC) no 1049/2001 (protection of privacy and the integrity of the individual),
- granted partial access to three documents (documents 2, 3 and 15), with the relevant parts redacted on the basis of the exceptions in Article 4(1)(b) of Regulation (EC) No 1049/2001 and in Article 4(2), first indent, of the said regulation (protection of the commercial interests),
- refused access to two documents (documents 10 and 29), based on the above-mentioned exception in Article 4(2), first indent, of Regulation (EC) No 1049/2001 and in Article 4(3) of the said regulation (protection of the decision-making process).

Through your confirmatory application, you request a review of this position. Indeed, you ask for further access to partially disclosed documents 2, 3 and 15 and access to documents 10 and 29 refused at the initial stage.

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<sup>3</sup> The list of the documents was annexed to the initial reply of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.

Please note that this decision concerns only the documents falling under the part of your application registered as Gestdem 2020/3792. Therefore, it covers the documents identified and to which public access was denied by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.

## **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 or service concerned at the initial stage.

As a preliminary comment, I note that in your confirmatory application, you point out that, I quote, '[...] document no. 10 is not listed in the table of documents'. Consequently, you ask if, I quote, '[the European Commission] could [...] confirm if there is an extra document that is not listed in the table or if the document is simply miss-numbered in the table as no. 9.1'.

Replying to that question, I confirm that there was indeed a mistake in numbering the annexes. Indeed, instead of Annex 9.1, the correct number of the annex was meant to be 10.

With regard to the substance, following this review I inform you that:

- further partial access is granted to document 2, partially disclosed at the initial stage. The undisclosed parts of that document still require protection under the exceptions in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual) and Article 4(2), first indent, of the said regulation (protection of the commercial interests),
- partial access is granted to documents 10 and 29, to which access was refused at the initial stage. The withheld parts of the documents are covered by the above-mentioned exceptions in Article 4(1)(b) and Article 4(2), first indent, of Regulation (EC) No 1049/2001,
- no further access is granted to 33 documents, to which (wide) partial access was granted at the initial stage. The undisclosed parts of these documents require protection under Article 4(1)(b) of Regulation (EC) No 1049/2001,
- no further access is granted to documents 3 and 15, partially disclosed at the initial stage. The underlying exception are provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 4(2), first indent, of the said regulation.

The detailed reasons 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 ‘the 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*)<sup>4</sup>, the Court of Justice ruled that when an application 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 data<sup>5</sup> (‘Regulation (EC) No 45/2001’) becomes fully applicable.

As from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 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/EC<sup>6</sup> (‘Regulation (EU) No 2018/1725’).

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 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’<sup>7</sup>.

Article 3(1) of Regulation (EU) No 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’<sup>8</sup>.

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<sup>4</sup> 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.

<sup>5</sup> Official Journal L 8 of 12.1.2001, p. 1.

<sup>6</sup> Official Journal L 205 of 21.11.2018, p. 39.

<sup>7</sup> *European Commission v The Bavarian Lager* judgment quoted above, paragraph 59.

<sup>8</sup> Judgment of the Court of Justice of 20 May 2003, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

The relevant parts of document 2 contain the name of staff member of the European Commission not holding any senior management positions. Also, documents 10, 15 and 29 contain the names, functions and biographic information (document 15) of the representatives and staff members of the third parties (economic operators, companies and industry associations). Documents 2 and 3 contain also the names and functions of the representatives and staff members of third parties (economic operators, companies and industry associations). I note, however, that in the redacted versions of these documents disclosed at the initial stage, the functions of the individuals representing the third parties were not redacted. Instead, the names of the companies they represent were withheld. Although the names of the companies, as such, do not constitute the personal data, however, their public disclosure would allow for the identification of the individuals representing them, as their functions, as mentioned above, were disclosed.

The names<sup>9</sup> of the persons concerned as well as other data from which their identity can be deduced constitute personal data in the meaning of Article 2(a) of Regulation (EU) No 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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) No 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 of its own motion the existence of a need for transferring personal data<sup>10</sup>.

This is also clear from Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, the European Commission has to examine the further conditions for a 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.

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<sup>9</sup> *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

<sup>10</sup> 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.

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 weighted the various competing interests.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Consequently, I consider that the necessity for the transfer of personal data (through its public disclosure) included in the document concerned has not been established. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's 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 disclosure of the personal data reflected in the document, 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 disclosure of the personal data concerned.

## **2.2 Protection of commercial interests of a natural or legal person**

Article 4(2), first indent, of Regulation (EC) 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'.

The undisclosed parts of document 2, contain information concerning current volume of production and the details of the supply chain of certain economic operators. These parts also include the information regarding the products on which these operators are currently working. The information is put in the context of the planned measures these operators intend to implement in order to increase the production, or in the context of their general business plans. In certain parts of this document, the type and level of detail of that information does not allow for its disclosure in the anonymised form, with only the names of the economic operators redacted. Indeed, this information, even in the anonymised form, would allow for the identification of the economic operators concerned.

Document 3 contains similar information; however, its level of detail is much lower, or is presented as a general comment relating mainly to groups of operators, rather than to the individual companies. Consequently, the information was anonymised by redacting the names of the economic operators concerned.

The relevant undisclosed part of document 15 contains information regarding actions and measures taken by certain economic operators in order to address the issue of access to the market in certain Member States, revealing their business strategies

The redacted parts of documents 10 and 29 contain the information concerning the assessment of their market situation in the context of that situation and the measures required, or taken in this context of the pandemic situation.

The information mentioned above has to be considered as commercially sensitive business information. Moreover, that information, provided in confidence by the economic operators consulted, only reflects the understanding of the subject matter by the staff members of the European Commission who drafted the requested internal documents.

Its public disclosure would undermine the interests of the economic operators concerned, as it would reveal the information related to their planned business activities. In this way, the competitors would receive insight into aspects of the business strategies of these operators. Furthermore, revealing the information regarding the situation of the economic operators concerned would have impact on their position on the market.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators concerned. I conclude, therefore, that access to the relevant undisclosed parts of documents 2, 3, 10, 15 and 29 must be denied based on the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 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.

As a preliminary remark, it must be noted that the General Court recently confirmed again that the right of access to documents does not depend on the nature of the particular interest that the applicant for access may or may not have in obtaining the information requested<sup>11</sup>. Please also 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.

In your confirmatory application, I quote, ‘[you] argue that there is an overriding public interest in accessing information that relates to the interactions between the [European] Commission and commercial lobbies, especially considering that these interactions concerned the EU’s response to the health crisis’.

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<sup>11</sup> Judgment of the General Court of 27 November 2018, *VG v Commission*, joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 55.

Consequently, the importance of the subject matter to which information included in the (undisclosed parts of the) documents relates (health crisis) requires, in your view, more transparency and thus warrants public disclosure of the documents.

Nonetheless, I note that these considerations are rather of a general nature and would not outweigh the interests protected under Article 4(2) of Regulation (EC) No 1049/2001.

Furthermore, I would like to underline that the access was refused only to limited parts of five documents and (wide) partial access was granted to the majority of the documents falling under the (restricted) scope of your initial application.

Please also note, that the Court of Justice, in the *Strack* case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance<sup>12</sup>. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure<sup>13</sup>.

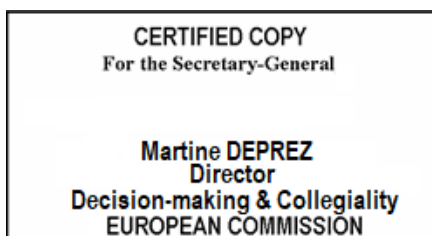
#### **4. PARTIAL ACCESS**

(Further) partial access is hereby granted to documents 2, 10 and 29. No further partial access is possible to documents 3 and 15, as their relevant undisclosed parts still require protection under the exceptions in Article 4(1)(b) and Article 4(2), first indent of Regulation (EC) No 1049/2001.

#### **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*

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<sup>12</sup> Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2104:2250, paragraph 128 (hereafter *Strack v Commission*).

<sup>13</sup> *Strack v Commission*, cited above, paragraph 129.