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NOTE

From: General Secretariat of the Council
To: Working Party on Information

No. prev. doc.: 10385/20

Subject: Public access to documents
- Confirmatory application No 19/c/01/20

Delegations will find attached a draft reply to confirmatory application No 19/c/01/20
(see 10385/20).

DRAFT REPLY ADOPTED BY THE COUNCIL ON ...
TO CONFIRMATORY APPLICATION 19/c/01/20,
made by email on 31 August 2020 and registered on 1 September 2020
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents CHARTE 4158/00

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter referred to as "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

I. INTRODUCTION

1. On 16 June 2020, the applicant submitted a request for access to document **CHARTE 4158/00** of 15 March 2000 which contains the curricula vitae (CVs) of the Members of the Convention on the Charter of Fundamental Rights. Up to that point only the first nine pages with an overview of the Members of the Convention had been publicly available. The actual CVs were not publicly available.
2. In its reply dated 11 August 2020, the General Secretariat of the Council partially refused access to document **CHARTE 4158/00** pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 in conjunction with Regulation (EU) 2018/1725, so as to protect the personal data of the members. However, since pursuant to Recital(6) of Regulation (EU) 2018/1725 this Regulation does not apply to the processing of personal data of deceased persons, the Curricula vitae of those Members of the Convention who are deceased were made accessible.

3. In the confirmatory application dated 31 August 2020 and registered on the following day, the applicant asks the Council to reconsider this position. The applicant is of the view that:
- A. The Council's refusal fails to state reasons and/or to properly apply Regulation (EC) No 1049/2001 and Regulation (EU) 2018/1725 because it allegedly
- (a) fails to identify a legitimate interest that might be prejudiced by the release of the CVs;
 - (b) fails to weigh the public interest for transfer against the legitimate interest that would be prejudiced by the release;
 - (c) fails to relate the consideration that the mandate for the Convention, given by the European Council of 15 and 16 October 1999 in Tampere, foresaw to make public documents only "*in principle*" to the specific case at hand.
- B. Request the Council to re-evaluate its position taking into account that:
- (a) the interpretation of the Tampere mandate in the initial refusal would amount to inverting the rule and exception as regards the exception invoked;
 - (b) some of the information in the CVs may be publicly available which is important to the balancing of interests;
 - (c) CVs submitted by senior political figures to a Convention which operated under the known rule of transparency belongs to the public sphere and not to the private sphere of the persons concerned.¹
4. The Council has carefully considered the confirmatory application. It has re-assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001, whether full public access can be granted to the requested document and has come to the conclusions set out below.

¹ Invoking judgment by the European Court of Human Rights in *Center for Democracy and Rule of Law vs. Ukraine* (Application no. 10090/16).

II. REQUESTED DOCUMENT CHARTE 4158/00

5. Document **CHARTE 4158/00** of 15 March 2000 which contains the curricula vitae (CVs) of the Members of the Convention on the Charter of Fundamental Rights.
6. The document was drawn up on the basis of input received from the Members of the Convention on the Charter of Fundamental Rights. This Convention was mandated by the European Council of 15 and 16 October 1999 in Tampere. Under the title "Working Methods of the body" this mandate states as regards transparency of the proceedings: "*In principle, hearings held by the Body and documents submitted at such hearings should be public.*"

III. ASSESSMENT OF THE REQUEST UNDER REGULATION (EC) No 1049/2001

7. The Council has reassessed the factual and legal situation and considers that the requested document falls within the remit of the exception relating to the protection of the public interest as regards privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001).
8. The Council considers that the requested document contains personal data of the Members of the Convention on the Charter of Fundamental Rights.
9. According to Article 3(1) of Regulation (EU) 2018/1725, personal data is in broad terms "*any information relating to an identified or identifiable natural person*". Moreover, the Court of Justice has constantly rejected any attempt to interpret restrictively the notion at issue. In particular, it has stressed that professional data or information provided as part of a professional activity may well be characterised as personal data;² it has pointed out that objection or agreement to disclosure is not a constituent part of the concept;³ it has further stressed that the fact that certain information has already been made public does not exclude its characterisation as personal data;⁴ finally, names and forenames, even when alone, qualify as personal data.⁵

² Judgment in *Commission v. Bavarian Lager* (C-28/08, ECLI:EU:C:2010:378, paragraphs 66 to 70).

³ Judgment in *ClientEarth et al. v European Food Safety Authority* (C-615/13 P, ECLI:EU:C:2015:489, paragraph 33).

⁴ Judgment in *Satakunnan and SATAMEDIA* (C-73/07, ECLI:EU:C:2008:727, paragraphs 48 and 49).

⁵ Judgment in *Commission v Bavarian Lager* (C-28/08 P, ECLI:EU:C:2010:378, paragraph 68.)

10. In light of the above, the Council considers that the requested document contains personal data and therefore falls within the remit of the exception provided for by Article 4(1)(b) of Regulation (EC) No 1049/2001.
11. According to established case law, when an application is made seeking access to personal data within the meaning of Article 2(1) of Regulation (EU) 2018/1725, the provisions of that Regulation become applicable in their entirety.⁶ More specifically, according to Article 9(1)(b) of Regulation (EU) 2018/1725 personal data may be transferred to recipients established in the Union only if two cumulative conditions are met: (1) the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and (2) 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.

1. The necessity and proportionality of the transfer

12. It is up to the applicant to show whether the transfer of the requested personal data is necessary, that is to say, whether it is the most appropriate measure to achieve the objective pursued by the applicant and if it is proportional to that objective.⁷
13. In this regard the applicant describes in general terms the necessity to have the CVs transmitted as follows: the interest of doing scholarly research on the Members of the Convention and how their background, experience and connections may have influenced the drafting of the Charter. The applicant is particularly interested in how "*members understood their professional profile at this point, what image they wished to portray to other members and what image other members saw*". Conversely, the applicant expressly states that there is no interest in the "*personal contact details*" of the Members as they are not relevant for the research. The applicant also stresses that the Members of the Convention were prominent public figures, their CVs twenty years old and that some of the information are in the public domain already. The applicant also underlines that the CVs were submitted to the Convention which was pursuant to the mandate given at the European Council in Tampere, in principle, public.

⁶ Ibidem, paragraph 63 regarding the predecessor Regulation (EC) No 45/2001.

⁷ Judgment in *Dennekamp v European Parliament* (T-115/13, ECLI:EU:T:2015:497, paragraphs 59, 77 and ff.).

14. The Council does not consider that the applicant's arguments are sufficient to establish the necessity of the transfer of the requested personal data in full (even if the applicant excludes contact details from the scope of the request).
15. To start with, as far as the applicant generally refers to the principles of transparency and openness, it should be stressed that Regulation (EC) No 1049/2001 only provides a right of public access to the extent that none of the exceptions provided by said Regulation applies. The automatic prevalence of the principle of transparency over data protection has been expressly ruled out by the Court.
16. As regards the objective to do scholarly research, the Council stresses that such an interest only extends to the personal data clearly falling within the public sphere of the persons concerned. Conversely, this interest does not extend to the personal sphere which is broader than only the personal contact details already excluded by the applicant.
17. Therefore, the scope of the data transfer requested by the applicant is not proportionate in relation to the objective pursued. On the one hand, the applicant has not shown why the considerable transfer of personal data would be the only appropriate measure to achieve the objective pursued. Scholarly research on the Members of the Convention can be conducted even without having access to the full CVs they made available to the other Members of the Convention. On the other hand, since the names of the Members of the Convention are well known, some - but by all means not all personal data - is to some extent publicly available, the objective of scholarly research can be pursued by other means than by having full access to all personal data.

2. The prejudice to a legitimate interest and weighing of interests

18. The Council considers that the disclosure of the personal data would prejudice the legitimate interests of the Members of the Convention. The data subjects did not give consent for the divulgation of their personal data to the general public at the time their CVs were submitted. Rather, the CVs were only made available at the time to the other Members of the Convention and the support staff of the Convention to protect the privacy and the integrity of the individuals concerned. Disclosure of the personal data of the persons still alive would cause prejudice to the protected interests of these individuals as it would make known to the general public information which was neither intended to be distributed to the general public nor have the data subjects given their consent to such a disclosure. Attempts by the General Secretariat of the Council to obtain such a consent as part of the present procedures for access to documents have not been successful.
19. Disclosure would also specifically and actually undermine the privacy of the Members of the Convention within the meaning of Article 4(1)(b) of Regulation No 1049/2001⁸ as distribution beyond the originally intended group of persons to the general public would make public personal information contained in the CV which was not intended for that audience. This harm to privacy will even extend to third persons mentioned in the CVs such as children or spouses who have not given their consent for the personal data to be publicly available. The risk of undermining this protected interest is also reasonably foreseeable and not purely hypothetical as disclosing the personal data in full would make known to the general public information which goes beyond the public sphere of the persons concerned and include personal data which relates to the private sphere. This is even the case in light of the passing of time since even after 20 years have passed the personal data related to the private sphere deserve protection.
20. While this establishes the legitimate interests of the data subjects concerned, the competing interests still need to be weighed.

⁸ See in this respect judgment in *McCullough* (T-496/13, EU:T:2015:374, paragraphs 84-86).

21. On the one hand, there is the principle of transparency. In this regard, the mandate for the Convention, given by the European Council of 15 and 16 October 1999 in Tampere, underlined regarding transparency of the proceedings: "*In principle, hearings held by the Body and documents submitted at such hearings should be public.*" However, this mandate already acknowledged that there may be exceptions to transparency. In this respect it is clear from the case law that when access is sought to personal data the provisions of the relevant Union legislation on the protection of such data become applicable in their entirety.⁹
22. Contrary to the argument of the applicant, this interpretation of the Tampere mandate does not amount to an inversion of the rule and exception contained in Regulation (EC) No 1049/2001. Rather, in full compliance with the relevant case-law¹⁰ it interprets and applies the exceptions contained in Regulation (EC) No 1049/2001 strictly. In particular this interpretation fully acknowledges the principle of transparency under Article 15 TFEU and underlying Regulation (EC) No 1049/2001 while at the same time giving full effect to the protection of personal data under Article 16 TFEU, Article 8 of the Charter and Regulation (EU) 2018/1725.
23. On the other hand, there is the protection of personal data. In this respect it should be noted that, the fact that a person holds public office does not mean that it can be presumed that personal data of that person falls in the public domain. Case-law recognizes that "*the distinction (...) in the case of public figures between the public and private spheres is relevant for the purposes of determining the degree of protection of personal data*" and that "*public figures have chosen to expose themselves to scrutiny (...) even if such a choice in no way implies that their legitimate interests must be regarded as never being prejudiced by a decision to transfer data relating to them*"¹¹ Moreover, the fact that certain information has already been made public does not exclude its characterisation as personal data.¹²

⁹ Judgment in *Dennekamp v. European Parliament* (T-115/13, EU:T:2015:497, paragraph 63).

¹⁰ See judgment in *API* (T-36/04, EU:C:2007:258, paragraphs 53 & 106) which is also referred to by the applicant.

¹¹ Judgment in *Dennekamp v Parliament* (T-115/13, EU:T:2015:497, paragraph 119).

¹² Judgment in *Satakunnan and SATAMEDIA* (C-73/07, ECLI:EU:C:2008:727, paragraphs 48 and 49).

24. In this respect the Council is of the opinion that CVs even of senior political figures who participated in a Convention which "*in principle*" operates under the rules of transparency, do not belong in their entirety to the public sphere but may contain personal data which belong to the private sphere. This is the case for all such personal data which are neither related to a public or official function that a person has held at or before the Convention was established nor when the individual makes reference to known publications in the public domain. Thus, the principle of transparency does not in this case outweigh the protection of personal data which relates to the private sphere of the data subjects concerned.
25. As regards the case-law of the European Court of Human Rights invoked by the applicant,¹³ the legal obligations as regards the interpretation of Articles 11 and 52(3) of the Charter are fully acknowledged. However, this case-law also acknowledges that public figures enjoy the protection of a private life under the European Convention of Human Rights and thus confirms, rather than undermines the distinction made above. Moreover, the specific case invoked by the applicant is about the education and work history of candidates running for public office in national parliaments and the CVs these candidates have submitted when registering for elections. Conversely, in the present case the CVs were not submitted as part of an election process for public office but by Members who had already been appointed to a Convention. Thus, the interest in public scrutiny is markedly different which has a decisive impact on the balancing of interests in the present case. In this respect it must be recalled that the European Court of Human Rights has consistently held that in determining whether personal information is retained rightfully by public authorities in for the enjoyment of the right to respect for private life, the Court will have due regard to the specific context.¹⁴
26. In light of these considerations, the Council deems that the disclosure of the requested personal data contained in the CV in their entirety would cause prejudice to the legitimate interest of the data subjects concerned and that, on balance, those interests as regards the private sphere prevail over the objectives pursued by the applicant.

¹³ Judgment in *Center for Democracy and Rule of Law vs. Ukraine* (Application no. 10090/16).

¹⁴ Judgments in *S. and Marper v. the United Kingdom* (Applications nos. 30562/04 and 30566/04, paragraph 67) and *Magyar Helsinki Bizottsag v. Hungary* (Application no. 18030/11, paragraph 193).

27. In the same vein, as regards the existence of an overriding public interest in disclosure under Regulation (EC) No 1049/2001, the Council considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interest so as to justify disclosure of the document in full.

IV. PARTIAL ACCESS PURSUANT TO ARTICLE 4(6) OF REGULATION (EC) NO 1049/2001

28. The Council has carefully reassessed the possibility to grant partial access to document **CHARTE 4158/00** pursuant to Article 4(6) of Regulation (EC) No 1049/2001.
29. The information contained in this document relates to and is covered by the exception under Article 4(1)(b) of Regulation (EC) No 1049/2001. However, where the personal data relate to the public sphere it is justified to grant partial access to such data. Therefore, an extended partial access is granted to document **CHARTE 4158/00**.

V. CONCLUSION

30. For the above-mentioned reasons, the Council concludes that pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access can only be granted to those parts of document **CHARTE 4158/00** which contain personal data relating to the public sphere of the data subjects concerned.