



EUROPEAN COMMISSION
Secretariat-General

The Secretary-General

Brussels, 17.09.2015
SG.B.4/DW/rc - sg.dsg2.b.4(2015)4188784

By registered mail:

Mr Arun DOHLE
Viktoriastr, 46
52066 Aachen
Germany

Copy by email:
ask+request-2116-5a2b410a@asktheeu.org

DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2015/3602

Dear Mr Dohle,

I am writing in reference to your email registered on 27 August 2015, by which you lodge 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 1049/2001).

1. SCOPE OF YOUR REQUEST

In your initial application submitted on 6 July 2015 and dealt with by the Commission's Directorate-General for Justice and Consumers (DG JUST), you asked for access to the following documents:

- a) The signed and registered version of the letter by former DG Justice Director-General Ms Françoise Le Bail to *Jurnalul National*,
- b) Information regarding the publication or not of the above mentioned letter in *Jurnalul National*,

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

² Official Journal L145, 31.05.2001 p.43.

- c) The transmission of the above-mentioned letter to the participants of the 2009 Adoption Conference in Strasbourg.

In its initial reply dated 10 August 2015, DG JUST informed you that it had identified the three documents listed below and granted you the wide partial access thereto:

1. Romanian version of the letter dated 14 October 2010 from Ms Le Bail to Mr Dan Constantin of *Jurnalul National*;
2. e-mails exchanged between 24 and 25 march 2011, concerning the failure to publish the above mentioned letter by *Jurnalul National*;
3. e-mail dated 16 October 2010 sent by DG JUST to the participants of the 2009 Adoption Conference in Strasbourg.

The undisclosed elements of the above-mentioned documents were redacted on the basis of the exception relating to protection of privacy and integrity of individual provided for in Article 4(1)(b) of Regulation 1049/2001.

In your confirmatory application you maintain your request for full access to the documents identified and question the assertion, by DG JUST, that it is not in possession of any other documents falling within the scope of your request.

I also note that on 28 August 2015, you sent a separate message to DG JUST with a series of additional questions relating to the initial reply of DG JUST provided on 10 August 2015. As these questions are not directly related to the substance of your confirmatory application, they will be addressed by DG JUST in a separate reply.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

2.1. Documents undisclosed at the initial stage

Following your confirmatory application, the Commission services verified again whether any other documents exist that would fall under the scope of your application. Following that verification, I confirm that no documents other than those already provided to you are held by the Commission. As the Commission is not in possession of the documents requested, your request – as far as this aspect thereof is concerned - cannot be handled.

2.2. Protection of privacy and integrity of individual

Article 4(1)(b) of Regulation 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 the confirmatory application you argue that *DG JUST is not treating the privacy of all civil servants at an equal manner*. To support this point, you refer to the name and surname that were not redacted from document (3) released by DG JUST at the initial stage.

According to the definition provided for in Article 2(a) of Regulation 45/2001³, personal data is *any information relating to an identified or identifiable natural person (...)*.

In accordance with the data protection rules, the Commission normally redacts personal data of staff members not occupying any senior management position from documents disclosed under Regulation 1049/2001. The same practice applies to outside individuals and staff members of third parties.

Document 3 is the message sent by DG JUST to the participants of the 2009 Adoption Conference. In that message, reference is made to another message provided to the participants of the above-mentioned conference by a person whose name and surname were erroneously not redacted from document 3. Indeed, as that person does not occupy any senior management position and the conditions of Regulation 45/2001 for releasing the documents have not been fulfilled, the name and surname should have been redacted.

Please note also that the clerical error that occurred at initial stage does not prejudice the general practice mentioned above, and detailed hereafter, with the respect to the other personal data appearing in the document.

Indeed, the redacted parts of documents 1–3 provided to you at the initial stage by DG JUST, fall under the definition of personal data mentioned above. Granting full access to documents 1-3 would constitute the processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling⁴, when a request is made for access to documents containing personal data, the Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.⁵ Only fulfilment of both conditions allows to consider the processing (transfer) of personal data as compliant with the requirement of lawfulness provided for in Article 5 of Regulation 45/2001.

³ 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.

⁴ Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*

⁵ Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 77-78.

I would also like to bring to your attention the recent ruling in the *ClientEarth* case, where the Court of Justice ruled that the Institution does not have to examine *ex officio* the existence of a need for transferring personal data⁶. In the same ruling, the Court stated that if the applicant has not established a need, the institution does not have to examine the absence of prejudice to the person's legitimate interests⁷.

Neither in the initial, nor in the confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data. Therefore, I have to conclude that the transfer of personal data through the disclosure of the requested documents would not be considered as fulfilling the requirement of lawfulness provided for in Article 5 of Regulation 45/2001 and in consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publically 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. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

A handwritten signature in black ink, consisting of a horizontal line with a large, sweeping loop that crosses over itself and extends upwards and to the right.

Alexander Italianer

⁶ Case C-615/13P, Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA*, paragraph 47.

⁷ Case C-615/13P, Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA*, paragraph 47-48.