EUROPEAN COMMISSION

Brussels, 26.7.2023
C(2023) 5251 final

Mr Aaron McLoughlin
Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – 2023/2252

Dear Mr McLoughlin,

I am writing in reference to your confirmatory application registered on 22 May 2023, submitted in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 16 April 2023, handled by Directorate A - Strategy, Better Regulation & Corporate Governance - of the Secretariat-General, you requested access to 'a copy of the decision [to remove the names of European Commission staff under Head of Unit level of the EU Whoiswho Directory] and copies of any supporting documents that influenced the decision'.

Directorate A of the Secretariat-General identified the following documents as falling under the scope of your request:

– Background document: privacy statement DPR-EC-00447. Processing operation: EU Whoiswho – Official Directory of the European Union, dated 27 January 2023[3] (hereafter 'document 1');

1 OJ L 345, 29.12.2001, p. 94.

2 OJ L 145, 31.5.2001, p. 43.

3 Also available on the Commission's DPO register at https://ec.europa.eu/dpo-register/detail/DPR-EC-00447.5.

– Internal communication between the Secretariat-General and the Publications Office of the European Union of 30 March 2023, reference Ares(2023)3833726 (hereafter 'document 2').

In its initial reply of 8 May 2023, Directorate A of the Secretariat-General granted you full access to document 1 and wide partial access to document 2 based on the exception of Article 4(1)(b) (protection of privacy and integrity) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

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 review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, the Secretariat-General has identified at confirmatory stage the following additional documents, as falling within the scope of your request:

– Internal communication in the Secretariat-General of 7 March 2023, reference Ares(2023)3838050 (hereafter 'document 3');

– Email from the Secretariat-General to the European Parliament and Council of 14 March 2023, reference Ares(2023)3829858 (hereafter 'document 4');

– Reply from the Council of 17 March 2023, reference Ares(2023)3829910 (hereafter 'document 5');

– Reply from the European Parliament of 16 March 2023, reference Ares(2023)3829946 (hereafter 'document 6');

– Email to the President's Cabinet of 21 March 2023, reference Ares(2023)3829965 (hereafter 'document 7').

I can inform you that:

– wide partial access is granted to documents 4-7, with redactions based on the exception of Article 4(1)(b) (protection of privacy and integrity) of Regulation (EC) No 1049/2001;

– further partial access is granted to document 2, with redactions based on the exception of Article 4(1)(b) (protection of privacy and integrity) of Regulation (EC) No 1049/2001;

– access is refused to document 3, based on the exception of Article 4(1)(b) (protection of privacy and integrity) and the second subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

Moreover, please be informed that no Commission Decision was adopted on the matter. Document 2 represents the Decision, which was taken after internal discussions at Secretariat-General's management level. I would also like to draw your attention to the fact that only two documents were identified at initial level. In your confirmatory request you mention three documents, however, documents 2 and 3 mentioned in your letter are the same.

As regards the redacted parts of documents 2, I have to confirm the initial decision of Directorate A of the Secretariat-General to refuse access, based on the exceptions of Article 4(1)(b) (protection of privacy and integrity).

As regards document 3 and the redacted parts of documents 4-7, I regret to inform you that I have to refuse access, based on the exceptions of Article 4(1)(b) (protection of privacy and integrity) and second subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

For the sake of clarity and as mentioned in the initial reply, the Secretariat-General notes that the measure to limit the publication of names and contact details in the EU Whoiswho to staff occupying management and adviser functions is part of the Commission's increased efforts on security and data protection, taking into account the concerns of several staff members in non-managerial positions not to disclose their data on EU Whoiswho directory in accordance with the data protection rules laid down in Regulation (EU) 2018/1725.

The European Commission remains fully committed to the principles of transparency and accountability. The names and contact details of staff occupying management and adviser functions continue to be accessible to the public. Importantly, the Commission has recently made their email addresses directly accessible.

Yet, transparency should not work against security of its staff. The Commission has an obligation of due diligence as a whole from undue external influence or pressure. This is particularly relevant for staff members dealing with sensitive files.

With the changes implemented, the European Commission has aligned its approach with the long-standing practice of the European Parliament and the General Secretariat of the Council that limit the publication of names and contact details in the EU Whoiswho directory to staff occupying management positions. This practice is also common in other international organisations or national administrations, which publish only the organisation chart, the contacts of the spokespersons, and of the senior managers (e.g. UN, OSCE, Belgian Federal Administration, Dutch Federal Administration, French ministries, German Federal Ministries).

Nonetheless, please note that pursuant to the settled case-law[4], a confirmatory application can only be submitted to invite the Commission to reconsider its initial position on the document(s) already requested. On that basis, please note that the present confirmatory decision is circumscribed to the review of the initial decision of the Secretariat-General's Directorate A and does not extend to a review of the Commission's measure itself.

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*)[5], 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 data[6] (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/EC[7] (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'[8].

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person […]'.

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4 Judgment of the General Court of 10 February 2021, *XC v European Commission*, T-488/18, EU:T:2021:76, paragraphs 168-169.

5 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.

6 OJ L 8, 12.1.2001, p. 1.

7 OJ L 295, 21.11.2018, p. 39.

8 *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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'[9].

Documents 2 and 3-7 contain personal data such as the names, surnames, contact details and initials of persons pertaining to staff members of the Commission not holding a senior management.

The names[10] 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[11]. 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 do not put forward any arguments to establish the necessity to have the data in the documents transmitted for a specific purpose in the public interest. Once again, the Secretariat-General notes that your arguments developed

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9 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.

10 *European Commission* v *The Bavarian Lager* judgment, cited above, paragraph 68.

11 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.

in relation to the public interest in your confirmatory application pertain to the policy choice of the Commission in undertaking the measure, and not to the public interest in disclosing the documents identified by the Commission under Regulation (EC) No 1049/2001. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Furthermore, you confirmed in your confirmatory application that '[you] have not requested the names of officials at all but the decision (and supporting evidence) for the dramatic change in transparency policy.' As a matter of principle, your claims seem to be contradicting in that you argue that the decision to remove such personal data from the Whoiswho directory reduces the transparency of the Commission's working methods, while at the same time acknowledging that you do not 'at all' request such data (i.e. the names of officials).[12]

Without prejudice to Secretariat-General's position established above, the Secretariat-General would in addition like to emphasise that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts. Disclosure of the personal data in documents 2 and 4-7 would specifically and actually undermine their privacy by allowing third parties to identify lower-managerial or non-managerial staff involved in certain files, who could in turn put pressure on staff to act or draft legislation to suit other interests than that of the institution.

Consequently, the Secretariat-General concludes 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 the disclosure of the personal data concerned.

2.2. Protection of the decision-making process

The second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 provides that 'access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.'

Close cooperation and effective coordination between all Commission services concerned is essential to the quality and consistency of the Commission's work. If such preliminary opinions of the Commission's services are disclosed, it would make officials

[12] See by analogy judgment of the General Court of 21 October 201, *Agapiou Joséphidès v Commission and EACEA*, T-439/08, paragraphs 118-119.

more hesitant to express their opinions free from fear of external pressure in the future. This would have a negative effect on the officials, who would not freely discuss sensitive questions, and, as a result, the institution would be deprived of relevant information concerning possible policy options. Indeed, as the General Court has held, 'the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process'[13]. Public disclosure of the (parts of the) documents would thus harm the Commission's ability to receive frank information on particularly sensitive files.

Document 3 contains internal exchanges between the various services of the Secretariat-General regarding the publication of the names of staff on the public EU WhoisWho portal, which explain the security concerns regarding the publication of these personal data. These exchanges represent opinions for internal use of the services as part of deliberations and preliminary consultations, for which, under the second subparagraph of Article 4(3), access may be refused even after the decision has been taken, where their disclosure would seriously undermine the decision-making process of that institution[14]. As for the case at stake, it should be noted that the possibility of expressing views independently within the institution is the key to allow meaningful internal discussions as well as the smooth running of decision-making processes.

Should such a possibility disappear, the different Commission services might turn to exchanging information only on an oral or on an informal basis, with serious consequences for righteous and independent decision-making processes within the EU institutions, taking also into account that generally these matters attract high attention, due to various conflicting interests at stake. Therefore, it is all the more important that the internal deliberations on these matters within the Commission be conducted independently, in an atmosphere of total serenity and free from external pressure.

It is not possible to give more detailed reasons justifying the need for confidentiality of the document without disclosing the opinions of the persons concerned and, thereby, depriving the exception of its very purpose[15].

Having regard to the above, the Secretariat-General has concluded that public access to document 3 must be denied on the basis of the exception to the right of access provided for in Article 4(3), second subparagraph (protection of the closed decision-making process) of Regulation (EC) No 1049/2001.

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13 Judgment of the General Court of 15 September 2016, *Phillip Morris* v *Commission*, T-18/15, EU:T:2016:487, paragraph 87.

14 Judgment of the Court of Justice of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08, EU:C:2011:496, paragraph 79.

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

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(3) 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.

In your confirmatory application, you argue that '[t]he new policy only serves to make the operations of the Commission less transparent to those concerned by EU affairs […]. [The right of initiative of the Commission] requires the ability to engage with and scrutinize the work undertaken by officials – most of which does not occur at the managerial levels. Most legislative and regulatory work is done by desk officers. […] It is in the public interest that the public can contact the desk officer working on legislative and regulatory decisions. The new policy runs contrary to administrative efficiency. […]'.

In its judgment in the *Strack* case[16], the Court of Justice 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, but that an applicant has to show why in the specific situation at hand, the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure[17]. The Court of Justice has acknowledged that a general reference to transparency is not sufficient to substantiate an overriding public interest[18], including general assertions that the disclosure of the documents is necessary for the protection of human health, without providing specific grounds showing to what extent such disclosure would serve that general interest[19].

The considerations such as those indicated in your confirmatory application cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing character over the reasons justifying the refusal to disclose the documents in question[20].

In particular, in the Secretariat-General's view, they do not demonstrate how public disclosure of these documents would contribute, in a concrete manner, to the protection of any public interest that would override the interests referred to in the corresponding sections above.

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16 Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack* v *Commission*, (ECLI:EU:C:2014:2250), paragraph 128.

17 Ibid, paragraph 129.

18 Judgment of the Court of Justice of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 93.

19 Judgment of the Court of Justice of 11 May 2017, *Sweden and Spirlea* v *Commission*, C-562/14 P, EU:C:2017:356, paragraphs 55-57.

20 Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland* v *European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

In its *Turco v Council* judgment, the Court held explicitly that the overriding public interest capable of justifying the disclosure of a document covered by this exception must, as a rule, be distinct from the principles of transparency, openness, and democracy or of participation in the decision-making process[21]. The reason is that those principles are effectively implemented by the provisions of Regulation (EC) No 1049/2001 as a whole.

Nor has the Secretariat-General been able to identify any public interest capable of overriding the public and private interests protected by Article 4(3) of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness[22], provides further support to this conclusion.

Please note also that Article 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

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

As explained above, (further) partial access is granted to documents 2 and 4-7. However, for the reasons explained above, no meaningful partial access is possible for document 3 without undermining the interests described above.

In this context, please note, that general considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question[23].

Consequently, the Secretariat-General has come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

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21 Judgment of the Court of First Instance of 23 November 2004, *Maurizio Turco* v *Council of the European Union*, T-84/03, EU:T:2004:339, paragraphs 81-83.

22 Judgment of the Court of Justice of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau Gmbh*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *Commission* v *Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

23 Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland* v *European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

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

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

Enclosures: (5)