



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 16 May 2012**

**8774/12**

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**"I/A" ITEM NOTE**

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from : Working Party on Information

to : Coreper (part 2)/Council

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No. prev. doc.: 8773/12

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Subject : Public access to documents

- Confirmatory application made by Ms Helen Darbishire (No 11/c/01/12)

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Delegations will find enclosed a draft reply from the Council to confirmatory application made by Ms Helen Darbishire (No 11/c/01/12), examined by the Working Party on Information on 11 May 2012.

The Danish, Estonian, Slovenian, Finnish and Swedish delegations indicated that they would vote against the draft reply. The following statements were made:

DK and FI: *"DK and FI are of the opinion that disclosing names of individuals who are performing a public function by attending a meeting of the Council would not, in general, undermine the protection of privacy and integrity of an individual in a manner prescribed in Regulations 45/2001 and 1049/2001."*

EE and SI: *"EE and SI are of the opinion that disclosing names of individuals who are performing a public function by attending a meeting of the Council would not, in general, undermine the protection of privacy and integrity of an individual in a manner prescribed in Regulation 45/2001."*

SE: *"SE does not agree with the reasoning regarding the establishment of necessity in the draft reply, an issue which was not dealt with by the Court in Bavarian Lager vs. Commission, C-28/08 P."*

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the Danish, Estonian, Slovenian, Finnish and Swedish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

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**DRAFT**

**REPLY ADOPTED BY THE COUNCIL ON .....**  
**TO CONFIRMATORY APPLICATION No 11/c/01/12,**  
**MADE BY E-MAIL ON 13 APRIL 2012,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to the List of Participants of the Working Party on Information**

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 "Regulation 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:

1. The applicant refers to the list of participants of the meeting of the Working Party on Information held on Friday 9 March 2012.
2. In its reply dated 20 March 2012, the General Secretariat refused full public access to this document pursuant to Article 4(1)(b) of Regulation No 1049/2001 (protection of the privacy and the integrity of the individual). Partial access was granted to the document pursuant to Article 4(6) of Regulation No 1049/2001.
3. In her confirmatory application dated 13 April 2012, the applicant argues that in its reply, the General Secretariat did not take into account Articles 5(1)(a) and 5(1)(b) of Regulation 45/2001 which permit under certain conditions the processing of personal data. According to the applicant, the legal obligation of the right of access to information should have been taken into account when deciding whether or not to release the information contained in the requested document. Furthermore, the applicant argues that the persons who attended the meeting of the Working Party on Information acted in their capacity as representatives of the Member States governments to discuss a legislative proposal and that their data in the document concerned relates exclusively to their public function. Hence, according to the applicant, the disclosure of their names cannot be construed as undermining the privacy of

these individuals. Moreover, the applicant claims that the refusal to release the document is contrary to the spirit of Article 8 of Regulation 45/2001 and prejudices the applicant's ability provide views and to participate in legislative decision-making.

4. The Council has considered this confirmatory application in the light of the applicant's arguments and has concluded as indicated below.
5. The Council recalls that Regulation 1049/2001 lays down the principle of widest possible access to documents, but at the same time provides for exceptions by reason of certain public and private interests. Among the public interests requiring protection, the Regulation provides, in Article 4(1)(b), for the protection of the "*public interest as regards privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*". According to established case-law, the said provision establishes a specific and reinforced system of the protection for personal data, with the consequence that, where a request based on Regulation 1049/2001 seeks access to documents including personal data, Regulation 45/2001 becomes applicable in its entirety, including Articles 8 (transfer of personal data to recipients, other than Community institutions and bodies) and 18 (data subject's right to object) thereof <sup>1</sup>.
6. As regards the requested document, it contains information on the name, functions, telephone number, fax number and email address of the delegates of the Council members, the representatives of the Commission, and officials of the General Secretariat of the Council taking part in the work of the Council's Working Party on Information on 9 March 2012. It is common ground that this information, relating to identified persons, constitute personal data within the meaning of Article 2(a) of Regulation 45/2001 <sup>2</sup> and that communication of these personal data to the public falls within the definition of processing of personal data within the meaning of Article 2(b) of that Regulation.

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<sup>1</sup> *Bavarian Lager vs. Commission* C-28/08 P, ECR [2010] p. I-6055, §§ 60, 63-64.

<sup>2</sup> 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, *OJ L 8 of 12.1.2001, p. 1*.

7. Contrary to what the applicant contends, communication of the personal data on the participants' list to the public under Regulation 1049/2001 does not constitute, without further examination of the necessity of the transfer in accordance with Article 8(b) of Regulation 45/2001, a processing "necessary for the performance of a task carried out in the public interest on the basis of the Treaties or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority" within the meaning of Article 5(a) of Regulation 45/2001. This conclusion is also supported by the wording of the data protection statement included in the footnote of the requested participants' list, which specifies that personal data on the list are compiled solely for the purpose of the General Secretariat's contact with those attending the meeting, and that the list may only be disclosed to the public "under certain conditions" under Regulation 1049/2001.
8. Moreover, the applicant contends that responding to requests for public access to documents is a legal obligation on the Council under the Treaties and Regulation 1049/2001, which therefore fulfils the conditions of Article 5(b) of Regulation 45/2001 ("processing is necessary for compliance with a legal obligation to which the controller is subject"). In this regard, the Council recalls that in *Bavarian Lager*, the Court of Justice rejected such an interpretation of the relationship between Regulation 1049/2001 and Regulation 45/2001, which the applicant in that case had already then invoked before the Court of First Instance, and affirmed that the two Regulations "*do not contain any provisions granting one regulation primacy over the other*" and that "*in principle, their full application should be ensured*".<sup>3</sup> Consequently, the processing envisaged under Regulation 1049/2001 cannot constitute a legal obligation for the purposes of Article 5(b) of Regulation 45/2001.
9. In order to verify whether the conditions for lawful processing under Article 5(d) ("the data subject has unambiguously given his or her consent") of Regulation 45/2001 are met, the Council took contact with the data subjects. All persons with the exception of four participants gave their consent to the disclosure of personal data concerning them. Accordingly, the General Secretariat has already disclosed to the public an expurgated version of the participants list with the personal data of four participants removed therefrom. Following the applicant's confirmatory application, the General Secretariat of the Council

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<sup>3</sup> *Bavarian Lager vs. Commission*, § 56.

again contacted the persons concerned and requested them whether they confirmed their opposition to their names and details being made public on grounds of compelling legitimate grounds relating to their situation. In reply to the General Secretariat's consultation, three persons concerned confirmed their opposition to the disclosure of their personal data to the public, except for their function, and one person agreed to the release of her personal data with the exception of her email address. The persons concerned invoked their expectation of the protection of their personal data as officials from national ministries participating in preparatory discussions in the Council's Working Party on Information who do not have overarching responsibility for decisions being made. They also invoked a risk of interference with their privacy and a risk of prejudice to their ability to carry out their duties if their personal data in question were to be disclosed.

10. On a subsidiary basis, in reply to the applicant's arguments, the Council also examined whether disclosure of the undisclosed personal data to the public would comply with Article 8(b) of Regulation 45/2001, which stipulates that personal data shall only be transferred to recipients subject to Directive 95/46/EC *"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"*.
11. In her confirmatory application, the applicant relies upon the fact that the members of the Working Party on Information are acting in their capacity as public officials, and accordingly, the data contained in the list relate exclusively to their public function, which cannot be construed as undermining the privacy of these individuals. While the Council agrees with the applicant that the openness of the institutions' work is a matter of public interest, which guarantees greater legitimacy of the institutions and their accountability to the citizens, this objective does not diminish the need to comply with the institution's obligations following from primary and secondary law regarding the protection of personal data. The Council also recalls in this regard that the right to respect for private life and to the protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union includes the professional or business activities of the individual.

12. Furthermore, the applicant, a non-governmental organisation whose mandate is to promote the right of access to information and public participation in decision-making, argues that it seeks access to the personal data contained in the participants' list in order to be able to form an opinion about the process of reform of Regulation 1049/2001 and to exercise the right to freedom of expression. In addition, it intends to provide participants with materials containing its analysis of the process of the reform of Regulation 1049/2001 and that of other organisations which have also expressed opinions on the reform. The Council considers that the objectives relied upon by the applicant do not establish the necessity of disclosure of the personal data of those participants in question. In fact, the non-governmental organisation which the applicant represents pursues a personal interest by promoting the objectives included in its mandate, an interest that may be attained by less onerous means than by disclosing to the public the personal data of those attending the meeting of the Working Party on Information. In fact, the outcomes of proceedings of the meetings of the Working Party on Information on the examination of the proposed recast of Regulation 1049/2001 contain a summary of the discussions which have taken place at the Working Party. These documents, along with other Presidency notes, are publicly accessible, enabling the applicant to form an opinion about the process of the reform of Regulation 1049/2001 and to elaborate its position on any issue of interest. The applicant has at its disposal other means of making known its position to those concerned, for example by contacting the national ministries concerned or by publishing it on its own internet site. Finally, the Council considers that the applicant's aim to assess the competence and the stance of the delegates on the reform of Regulation 1049/2001 would interfere with the respect of the data subjects' above-mentioned rights to private life and to the protection of their personal data.
13. The Council concludes that the interests invoked by the applicant do not establish the necessity of the transfer in accordance with Article 8(b) of Regulation 45/2001, and in addition, there is reason to assume that the legitimate interests of the individuals concerned would in deed be prejudiced.
14. Consequently, the disclosure of the unreleased parts of the document concerned would not comply with Regulation 45/2001 and would therefore jeopardise the protection of the privacy and integrity of the individuals concerned, in particular under European Union legislation on

personal data protection. This being the case, and pursuant to Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual), the Council confirms the General Secretariat's decision not to grant full public access to the document in question.

15. The Council has also examined the possibility of granting extended partial access to the document in question in accordance with Article 4(6) of Regulation 1049/2001. As already indicated in point 9 above, the persons concerned were contacted again following the confirmatory application and three persons agreed to the release of their function and one person to the release of her personal data, with the exception of her email address. As regards the remaining undisclosed parts of the document, the Council concluded that the protection of the public interest invoked applies to those parts.

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