



Council of the
European Union

Brussels, 3 September 2020
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API 102

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 19/c/01/20

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 16 June 2020 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 11 August 2020¹ (Annex 2);
- confirmatory application dated 31 August 2020 and registered on 1 September 2020 (Annex 3).

¹ This reply only concerns access to document CHARTE 4158/00; the reply regarding the other issues raised by the applicant was sent to him on 7 July 2020.

[E-mail message sent to access@consilium.europa.eu on 16 June 2020 - 14:25]

From: DELETED

Sent: Tuesday, June 16, 2020 2:25 PM

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Cc: DELETED

Subject: Re: Ref. mj - Ref. 20/0319 - mj - RE: Missing Charter travaux préparatoires

Dear Transparency,

I hope all is well. I am following up with two requests and three clarifying questions.

Requests

1. The Council List (6933/15, p4) includes CHARTE 4123/00 as well as REV1. However, we were only able to locate CHARTE 4123/1/00 REV1. When I search on the Council Register, nothing [comes up](#). Would you possibly be able to send us CHARTE 4123/00's INIT version?

2. CHARTE 4158/00 attaches the CVs of the Convention Members. However, the CVs have been removed. We assume that this is on personal data grounds, such that the onus is in principle on me to demonstrate that the conditions of art. 9(1)(b) of Reg (EU) 2018/1725 are fulfilled as per the *Bavarian Lager* case.

In this respect:

a. A number of the CVs are of deceased persons – for instance, Roman Herzog and Guy Braibant's. Their data falls outside of the above Regulation (recital 6 of that Regulation). Unless another ground of refusal under art.4 applies, they should be released.

b. For the remainder, access to the CVs is necessary for the specific purpose of the research that I and others are conducting into the Charter Convention. Access to these CVs would allow us to understand the background, experience and connections of those involved in the drafting. That is in turn crucial to understanding the drafting process, contributions of particular actors and the deeper currents underlying the same. This research is clearly in the public interest, concerning as it does one of the most important constitutional documents of the Union.

c. Just to briefly flesh the above point out: so far, my research has uncovered some connections. Stefan Rodotà played an important role in the shaping of certain bioethical provisions, and was in fact a member of the European Group on Ethics. Guy Braibant did the same, and had previously authored the first Conseil d'État report on bioethics in 1988. These aspects of their background are crucial pieces of the puzzle without which one cannot fully understand the process.

However, they are very partial pieces of the puzzle. Some information on members' other roles is available online, but this is in a fragmented and at times incomplete form. Access to the CVs would thus play two crucial roles. First, it would provide a relatively comprehensive, centralised list of members' relevant background, experience and connections. Only this would permit the full picture to be built up. Second, it would provide the CVs of the Members as they stood in 2000 and as they had distributed to other Convention Members. This in turn casts particular light on how members understood their professional profile at this point, what image they wished to portray to other members and what image other members saw. The Strasbourg Court has recently recognised the particular interest, in the context of an access to information case, in seeing information 'presented first-hand by the [public figures] themselves': *Centre for Democracy and the Rule of Law v. Ukraine* (App no. 10090/16), Judgment of 26 March 2020, §98. That case-law of course affects the interpretation of art.11 CFR, and therefore to this secondary law: art. 52(3) CFR.

For these two reasons, it is particularly the CVs in CHARTE 4158/00 that are necessary for the above specific purpose in the public interest.

d. I respectfully submit that the above interest is a weighty one and decisively outweighs any legitimate interests of the data subjects, insofar as they are even engaged. **First**, specific pieces of personal data that do not contribute to the above interests (e.g. personal contact details) can of course be redacted. **Second**, these CVs are twenty years old. It is difficult to see what legitimate interest could be harmed by their release today. **Third**, all of the figures involved in the Convention were prominent public figures, typically elected to positions of public responsibility. Some of the information will be available in the public domain already. They submitted their CVs as part of a quasi-constitutional Convention which was particularly transparent. All documents submitted to the Convention were, in principle, public ([Tampere mandate](#), Annex, point B(ii)). All of these factors reduce or eliminate the prejudice to the figures' legitimate interests. Compare, in this sense, *Centre for Democracy* §117.

e. For the reasons set out above, I respectfully submit that (i) the CVs of deceased persons may not be withheld under art.4(1)(b) of Reg 1049/2001, and (ii) art.9(1)(b) of Reg 2018/1725 is fulfilled in respect of the CVs of living persons, save in the case of contact details, such that again art.4(1)(b) of Reg 1049/2001 does not apply.

Questions

3. Do you have any information as to who translated documents submitted by the Convention Members and the NGOs? Were translations provided by the Council services in some or all cases, or were translations submitted by the Members and NGOs (and others) themselves?

4. Do you have any information on how documents were classified to the CONVENT or CONTRIB categories, and who did this? For instance, CHARTE 4141/00 is submitted by one Member (the President) and is down in the contributions section in Council Note 6933/2015, but it is in the CONVENT category. Some of Braibant's submissions are in CONTRIB and others are in CONVENT (e.g. CHARTE 4160/00 vs. 4135/00).

5. Do you have any information on the meaning of the dates of documents? For instance, take CHARTE 4105/00. Is the first date the date of the original, the date in brackets the date this translation was distributed, and the bit saying '(OR. f,d,es,p,s)' meaning that the original was in French, Dutch, Spanish etc? Are these dates in principle the dates that documents were circulated to all members? I note that Jürgen Meyer's commentary suggests that some documents were in fact circulated later than the dates might suggest.

Best wishes,

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Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 11 August 2020

DELETED

Email: **DELETED**

Ref. 20/1139-mj/ns

Request made on: 16.06.2020

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.²

We apologise for the delay in replying to your request.

Document CHARTE **4158/00**, dated 15 March 2000, contains a list of the nominations and the Curricula vitae of the Members of the Convention on the Charter of Fundamental Rights.

The requested document contains personal data which is to be protected pursuant to Article 4(1)(b) of Regulation (EC) No **1049/2001** in conjunction with Regulation (EU) **2018/1725**. According to established case law (C-28/08 P, Commission v. Bavarian Lager, EU:C:2010:378, paragraph 63), where an application under Regulation **1049/2001** is made seeking access to personal data within the meaning of Article 2(1) of Regulation **2018/1725**, the provisions of that Regulation become applicable in their entirety.

² The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

However, as regards personal data of deceased persons, Recital(6) of Regulation (EU) 2018/1725 states that "[t]his Regulation should not apply to the processing of personal data of deceased persons."

As regards the personal data of persons still alive, pursuant 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) You describe in general terms the necessity to have the CVs transmitted as follows: You refer to the interest of doing scholar research on the members of the Convention and how their background, experience and connections may have influenced the drafting of the Charter. You are 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, you expressly state that there is no interest in the "personal contact details" of the members as they are not relevant for the research. You also stress that the members of the Convention were prominent public figures, that their CVs are twenty years old and that some of the information are in the public domain already. You also underline that the CVs were submitted to the Convention which was pursuant to the mandate given at the European Council in Tampere, in principle, public.

(2) The disclosure of the personal data may prejudice the legitimate interests of the persons concerned whose personal data remain protected even though some personal information is already in the public domain and they may be public figures.

On the weighing of competing interest, on the one hand, it must be borne in mind that the interest in disclosure is not without limits. 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." From this already follows that not all documents would become unconditionally accessible to the public. Moreover, the mandate cannot derogate from the protection of privacy and the integrity of the individual under Article 4(1)(b) of Regulation (EC) No 1049/2001.

On the other hand, the protection of personal data outweighs the interest of transparency in the present case. In this regard it should be borne in mind that the fact that certain information has already been made public does not exclude its characterisation as personal data (C-73/07, Satakunnan and Satamedia, EU:C:2008:727, paragraphs 48 and 49). Moreover, 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" (T-115/13, Dennekamp v. Parliament, EU:T:2015:497, paragraph 119). Also personal data is protected under Regulation (EU) 2018/1725 for the entire lifetime of a person.

As regards the existence of an overriding public interest in disclosure under Regulation (EC) No 1049/2001, the General Secretariat 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 the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to the document CHARTE 4158/00. However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, you may have access to the list of the nominations on pages 1 to 9 and the Curricula vitae of those Members of the Convention who are deceased.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).

Yours sincerely,

Fernando FLORINDO

Enclosure

[E-mail message sent to access@consilium.europa.eu on 31 August 2020 - 18:09]

From: **DELETED**

Sent: Monday, August 31, 2020 6:09 PM

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Cc: **DELETED**

Subject: Re: Ref. 20/1139-mj/ns

Dear General Secretariat,

Many thanks for this.

Confirmatory application

I am writing to make a confirmatory application in respect of the Council's decision ('the Decision') to withhold the entirety of CHARTE 4158/00, except insofar as it consists of the CVs of deceased persons, under article 4(1)(b) of Regulation (EC) 1049/2001 ('the Regulation').

1. The Council has not contested that the transfer of this information is necessary for the specific purposes in the public interest stated in the original application.
2. The Decision rather hinges on the claim that the the data subjects' limit interests would be prejudiced by the transfer and that this prejudices outweighs the interest. I recall that there is no presumption in favour of withholding once necessity has been demonstrated: T-115/13 *Dennekamp* EU:T:2015:497 para 127.
3. The Council's reasoning is, however, vitiated by a manifest failure to state reasons and/or properly to apply the provisions of Regulations 1049/2001 and 2018/1725. The Decision fails to provide any substantive reasoning whatsoever for its refusal. In particular:

a. It fails to identify any legitimate interest that might be prejudiced by release of the CVs. But this is a threshold condition for the carrying out of a balancing exercise at all: T-115/13 *Dennekamp* EU:2015:497, para 116; C-615/13 P *ClientEarth* EU:C:2015:489, para 66. Those reasons must show specific and actual harm which must be reasonably foreseeable and not purely hypothetical: T-496/13 *McCullough* EU:T:2015:374 paras 84 and 86. This failure is fatal to the Decision.

b. Consequently, it fails to weigh the strength of the specific purposes in the public interest for which transfer is necessary against the legitimate interest that would be prejudiced by release. This failure is again fatal to the Decision.

c. Instead, the Decision sets out a number of generic considerations: that the Tampere Mandate had implicitly acknowledged that documents might be private by using the words ‘[i]n principle’ and that this could not ‘derogate from’ art.4(1)(b) of Reg 1049/2001; that public information might still be personal data; and that public figures may still have a private sphere, as recognised in *Dennekamp*. Nothing in the Decision attempts to relate these considerations to the specific facts of the case. This falls below even the loosest interpretation of the obligation to state reasons and to show a specific and actual risk to the legitimate interests (T-639/15 (etc.) *Psara* EU:T:2018:602, para 136; *McCullough*, paras 84 and 86). This is, again, fatal to the Decision.

4. I respectfully invite the Council to re-take the Decision in conformity with the legal principles set out above, including the obligation to state reasons, to show specific and actual harm to the data subjects’ legitimate interests, and to weigh up the interests concerned in this specific case. I respectfully submit that, for the reasons set out above and in my original application, the balance under art.9(b) of Regulation 2018/1725 decisively favours disclosure of the remaining CVs, save in the case of contact details.

5. In particular, insofar as the generic reasons set out in the Decision (summarised at §3 above) might be elaborated on and made relevant to the instant case, I make the following pre-emptive observations:

i. The interpretation of the Tampere Mandate inverts the relationship between the rule and the exception. This is untenable (compare T-36/04 *API* EU:C:2007:258, para 106). It further appears to misunderstand the Applicant's argument: the fact that the CVs were submitted voluntarily by the public figures in question as part of a public process, knowing that the mandate provided for documents to be public in principle, is manifestly an important factor in the weighing process under art.9(b) of the 2018 Regulation. It is part of the 'environment' that must be taken into account: *Dennekamp*, para 119. This does not replace, but rather is relevant to, the assessment under art.4(1)(b) of Reg 1049/2001 and art.9(b) of Reg 2018/1725.

ii. Whilst public information may also be personal data, it does not follow from that fact alone that there is a legitimate interest in withholding it: *McCullough*, paras 85-6. On the contrary: the fact that some of the information may be public is plainly relevant to the balancing exercise: see again *Dennekamp* para 119 and compare ECtHR, *Satakunnan* (App no. 931/13), Judgment of 27 June 2017, para 187 and *Centre for Democracy and the Rule of Law v. Ukraine* (App no. 10090/16), Judgment of 26 March 2020, §115. I recall that the latter case-law is relevant to the interpretation of Reg 1049/2001 via art.11 and art.52(3) CFR.

iii. Public persons do indeed have a private sphere. But I respectfully submit that CVs circulated by senior political figures to a public Convention, subject to intense public scrutiny, which Convention was drafting one of the most important constitutional documents of the EU and operating under a known rule of transparency, plainly falls on the 'public' side of that line: compare *Dennekamp* paras 118-123 and T-496/17 para 87. This is particularly so given that the core content of CVs is a statement of the subject's 'education and professional activities' which fall on the public side of this line in this context: compare ECtHR, *Centre for Democracy and the Rule of Law v. Ukraine* (App no. 10090/16), Judgment of 26 March 2020, §§115, 117. It follows that any interests in privacy (which, to recall, the Council has in any event not identified) would be subject to a lesser degree of protection in the balancing exercise: *Dennekamp*, para 124.

Kind regards,

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