



EUROPEAN COMMISSION

Brussels,

Mr Mathias Schindler
Bundestagsbüro Julia Reda
MdEP Unter den Linden 50
11011 Berlin
Germany

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/5319**

Dear Mr Schindler,

I refer to your letter of 16 November 2019, registered on 18 November 2019, in which you submitted 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 (EC) No 1049/2001’).

Please accept our apologies for this late reply, which is due to the many inter-service and third party consultations that took place in relation to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 17 September 2019, addressed to the Directorate-General for Communications Network, Content and Technology, you requested access to, I quote:

1. ‘all information (including but not limited to letters, emails, email drafts, documents, notes, memoranda, studies, remarks, copies, data, files, facsimiles, drafts and records) about the notification under Directive 98/34/EC related to the German Presseverlegerleistungsschutzrecht (Achttes Gesetz zur Änderung des Urheberrechtsgesetzes dated May 7, 2013 (BGBl 2013 I Nr. 23 ,pg 1161)
2. any information (see above) related to the interpretation of Directive 98/34/EC with regards to the notification requirements in the field of copyright.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

3. any information within the Commission and their staff regarding the ancillary copyright law ("Leistungsschutzrecht für Presseverleger")
4. any information concerning the recently closed ECJ case on the notification of the German Leistungsschutzrecht³.

You requested that any document that was fully released in the context of past requests³ submitted by you should be excluded from the scope of the present request. You also requested the full release of any document, which was not disclosed or only partially disclosed in the context of these past requests given that the reasons for non-disclosure are no longer applicable.

Please note that parts of your request have been attributed to others services within the European Commission⁴.

The current review performed by the Secretariat-General relates only to the reply of Directorate-General for Communications Network, Content and Technology, namely regarding point 3 and partly point 4 of your request.

The Directorate-General for Communications Network, Content and Technology informed you that your request (as regards points 3 and partly point 4), concerned a large amount of documents, collected both from past requests submitted by yourself in the framework of which full access was not granted to all the documents⁵ and new documents in relation to the topic. Consequently, it sent you a fair solution proposal, inviting you to reduce the scope of your request. Furthermore, in case you were not in a position to reduce the scope, the Directorate-General for Communications Network, Content and Technology suggested to restrict the scope to 24 documents, more specifically to (i) 14 most recent documents and (ii) 10 documents which would need to be chosen by you from the non-disclosed or partially released documents in the context of past requests.

You agreed to the latter fair solution proposal concerning the 14 most recent documents, but failed to specify which documents from past requests you are interested in, after the Directorate-General for Communications Network, Content and Technology invited you to do so and informed you that in the absence of a reply from your side, it will unilaterally restrict the scope of your request⁶.

Consequently, the Directorate-General for Communications Network, Content and Technology unilaterally restricted the scope of your application to those documents that could be dealt with within the extended deadline. Particularly, it selected 10 documents from past requests, which were partly refused at the time, in addition to 8 more recent documents.

³ GestDem 2015/3352 and GestDem 2019/0859.

⁴ GestDem 2019/5565 attributed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (points 1, 2 and part of point 4 of you request) and GestDem 2019/5977 attributed to the Legal Service (part of point 4 of your request).

⁵ GestDem 2016/0411 and GestDem 2018/0811.

⁶ Reference Ares(2019)6298065.

Please note that the number of the documents identified in the scope of the present request is slightly lower than the one initially suggested (amounting to 24 documents). This is explained by the fact that some of the recent documents identified, as far as point 4 is concerned were handled by the Legal Service in the context of request GestDem 2019/5977.

Consequently, the Directorate-General for Communications Network, Content and Technology identified the following documents as falling under the scope of your request, in the following two sets of categories:

Recent documents :

- Document 1: Email correspondence with stakeholder concerning ancillary copyright law in Germany dated 01/05/2018, reference Ares(2018)2988925;
- Document 2 Email received from VG media on 01/06/2019 concerning their press release on publishers rights (including attachment), cnect.ddg2.i.2(2019)677708;
- Document 3: Email correspondence with stakeholder concerning ancillary copyright law in Germany dated 04/05/2019, reference Ares(2018)2988970;
- Document 4: DG CNECT note to Legal Service in preparation of oral hearing in case C- 299/17 dated 27/09/2018, reference Ares(2018)4986481;
- Document 5: DG CNECT note to Legal Service concerning observations in case C- 299/17 dated 05/09/2017 reference Ares(2017)4327988;
- Document 6: Stakeholder letter “Necessary Participation of EU Commission in European Court of Justice (CJEU) – Case C-299/17 dated 06/06/2017, reference Ares(2017)2899435;
- Document 7: Email received from VG media on 12/09/2019 concerning their press release on press publishers rights (including attachment), cnect.ddg2.i.2(2019)6777615;
- Document 8 : Mission report on oral hearing in C- 299/17 of 24/10/18, cnect.ddg2.i.2(2019)6813933;

Documents from past requests (GestDem 2016/0441 and GestDem 2018/0811):

- Document 9 : Back to office report prepared for meeting between Commission Oettinger and Burda of 20/12/2016, reference Ares(2018)1991929;
- Document 10 : Back to office report prepared for meeting with ENPA and EMMA of 08/05/2017, reference Ares(2018)1992038;
- Document 11: Briefing for meeting between Commissioner Gabriel and EMMA of 08/09/2017, reference Ares(2017)4645755;
- Document 12: Briefing for meeting of Commissioner Gabriel with ENPA and Les Echos of 13/09/2017, reference Ares(2017)4720602;
- Document 13: Briefing for meeting with EPC of 06/12/2017, reference Ares(2017)6295403;
- Document 14: Briefing for meeting of Commissioner Oettinger with EMMA of 29/09/2015, reference Ares(2015)4267957;
- Document 15: Briefing for meeting of Commissioner Oettinger with Press Publishers of 25/01/2016, reference Ares(2016)680656;

- Document 16: Briefing for meeting of Claire Bury with Computer and Communications industry Association of 04/02/2016, reference Ares(2016)866614;
- Document 17: Briefing for meeting of Commissioner Oettinger with Publishers of 09/03/2016, reference Ares(2016)1446342;
- Document 18: Briefing for Vice President Ansip visit to Paris of 22/03/2016 (including two attachments), reference Ares(2016)1625229.

In its initial reply of 15 November 2019, the Directorate-General for Communications Network, Content and Technology granted full access, as far as the parts of the documents falling within the scope of the request are concerned, and subject to the redaction of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001 to documents 2, 4, 5, 7, 8, 12, 16, 18.

Parts of documents 9-11, 13-15 and 17 were protected under the exceptions of Article 4(2) first indent (protection of the commercial interests) and Article 4(3) second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

Finally the Directorate-General for Communications Network, Content and Technology refused to grant access to documents 1, 3 and 6 based on the exception protecting the decision-making process as laid down in Article 4(3) second subparagraph of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position.

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

Following this review, I can inform you that:

- All of the redactions performed under the commercial interests' exception as laid down in Article 4(2) first indent of Regulation (EC) No 1049/2001 have been lifted, with the exception of limited parts in document 17;
- Wide partial access subject to the redaction of personal data is granted to documents 1 and 3. As these documents contain your own personal data which cannot be withheld from you, without however granting public access to it, two sets of these documents will be provided to you;
- Access to limited parts of documents 14, has to be refused under the exception protecting the decision-making process as laid out in Article 4(3) second subparagraph of Regulation (EC) No 1049/2001.
- Access to limited parts of document 6 has to be refused based on the exception provided for in Article 4(2) second indent (protection of court proceedings and legal advice) of Regulation (EC) No 1049/2001.

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*)⁷, 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 data⁸ (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/EC⁹ (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'.¹⁰

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

The documents contain personal data such as the names and initials of staff members of the European Commission who do not form part of the senior management of the institution. Moreover, they contain the personal data of other individuals, who are not public figures acting in their public capacity.

⁷ 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.

⁸ OJ L 8, 12.1.2001, p. 1.

⁹ OJ L 205, 21.11.2018, p. 39.

¹⁰ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

The names¹¹ 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 data¹². 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 transmitted for a specific purpose in the public interest. 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.

Notwithstanding the above, 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.

¹¹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹² 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.

Consequently, I conclude 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.

Finally, I note that documents 1 and 3 contain your own personal data.

The General Court acknowledged that an institution cannot, on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001, refuse access to documents on the ground that their disclosure would undermine the privacy and integrity of an individual, when the documents in question contain personal data exclusively concerning the applicant for access.

However, the General Court has also stated that, in those circumstances, the right of the latter to obtain disclosure on the basis of the right of access to documents of the institutions cannot have the consequence of opening a right of access of the public in general to those documents¹³.

The European Commission has so far implemented the General Court's reasoning by creating two sets of documents – one set with *erga omnes* effects without any personal data disclosure to the public at large and another one with applicant restricted access, containing the personal data of the applicant and which is sent to the latter only.

Consequently, as your personal data should not be withheld from you, without, however, granting public access to your personal data, applicant restricted access is granted to the two documents containing your personal data. Please note that the access granted to the documents containing your personal data is not public. These documents will be disclosed to you only.

Therefore, two sets of documents 1 and 3 are attached to this reply. The documents to which applicant restricted access is granted to you are labelled as such.

Furthermore, I note that you submitted your request via *AsktheEU.org* website. Please note that this platform proactively publishes the content of all correspondence between the European Commission and the applicant (including the final reply and attached documents to which access is granted). This includes the personal data that applicants may have communicated to the European Commission.

I note that sending these documents to the email provided by you would lead to their subsequent publication on the *AsktheEU.org* website, which in turn would amount to a data breach as your identity could easily be inferred.

¹³ Judgement of the General Court of 27 November 2018, *VG v European Commission*, Joined Cases T- 314/16 and T- 435/16, EU:T:2018:841, paragraphs 52-54, Judgment of the General Court of 22 May 2012, *Internationaler Hilfsfonds eV v European Commission*, T-300/10, EU:T:2012:247, paragraphs 107 to 109, Judgment of the General Court of 12 May 2015, *Unión de Almacenistas de Hierros de España v European Commission*, T- 623/13, EU:T:2015:268, paragraph 91.

Therefore, I have decided to send the documents containing your own personal data only to the alternative private email address, which you have provided.

2.2. Protection of court proceedings and legal advice

Article 4(2) second indent of Regulation (EC) No 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice.

In its judgement in Case T-84/03, the Court of First Instance¹⁴ underlined that the exception provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001 protects two distinct interests: court proceedings and legal advice¹⁵. In the present case, the refusal of access to the (parts of) the document concerned is based on a need to protect both the ongoing court proceedings and legal advice.

In its judgment *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, the Court of Justice ruled that the protection of legal advice must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.¹⁶

The advice has to be related to a legal issue, which is the decisive aspect for applying this exception¹⁷. In its judgment in Case T-755/14, the General Court took the position that legal advice is ‘advice relating to a legal issue, regardless of the way in which that advice is given’¹⁸. Furthermore, according to the General Court's reasoning, ‘there is nothing in the wording of the second indent of Article 4(2) of Regulation (EC) No 1049/2001 to support the conclusion that that provision concerns only advice provided or received internally by an institution’¹⁹.

Furthermore, the exception under Article 4(2) second indent also aims to protect the serenity of court proceedings, the principles of equality of arms and the sound administration of justice²⁰. The Court declared that ‘it does not follow from the case-law [...] that other documents [in addition to pleadings] are to be excluded, should the case arise, from the scope of the exception relating to the protection of court proceedings’²¹, and that ‘[t]he need to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such

¹⁴ Currently: the General Court.

¹⁵ Judgment of 23 November 2004, *Turco v Council*, T-84/03, EU:T:2004:339, paragraph 65.

¹⁶ Judgement of the Court of Justice of 1 July 2008, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, Joined Cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42.

¹⁷ Judgment of the General Court of 15 September 2016, *Herbert Smith Freehills v Commission*, case T-755/14, EU:T:2016:494, paragraph 47.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, paragraph 48.

²⁰ Judgment of the General Court of 15 September 2016, *Philip Morris v Commission*, T-18/15, EU:T:2016:487, paragraph 64.

²¹ *Ibid.*

as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise that equality²².

However, at the same time, the Court has equally emphasised that ‘in order for the exception to apply, it is necessary that the requested documents, at the time of adoption of the decision refusing access to those documents, should have a relevant link either with a dispute pending before the Courts of the European Union, [...] or with proceedings pending before a national court [...]’²³. I note that the requested document 6 constitutes a position paper, signed by more than 30 different organisations, inviting the European Commission to deliver an opinion in the Court case C-299/17 VG Media against Google²⁴.

We have consulted all of the third parties concerned on disclosure of the document originating from them. Those who have replied objected the disclosure of this document, with the argument that even if the European Court of Justice has already rendered its judgment in this preliminary ruling procedure, the proceedings are still pending before the national court in Germany²⁵.

Nonetheless, the European Commission has decided not to follow the full objection of the third parties and to provide partial access to this document.

The redacted part of the document contains the legal assessment of the questions referred for a preliminary ruling, notably as regards questions of interpretation of the provisions of Directive 98/34/EC²⁶ and the consequences of this interpretation for the German law creating rights for publishers.

This legal opinion on a complex and highly sensitive matter, related to the topic of neighbouring rights for publishers, was drafted in the context of the pending litigation and is still the source of debates within the EU. I would like to point out that even if the Copyright Directive²⁷ establishing a European publishers’ right was adopted, it has not yet been transposed in most of the Member States and, in some countries, may lead to litigation²⁸.

²² *Ibid.*

²³ *Ibid.*

²⁴ Judgement of the Court of 12 September 2019, *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC, successor in law to Google Inc.*, case C-299/17, EU:C:2019:716.

²⁵ Berlin District Court, file number 16 0 546/15.

²⁶ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998, p. 37–48.

²⁷ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance), OJ L 130, 17.5.2019, p. 92–125.

²⁸ For instance, ongoing conflict in France with Google in relation to the refusal of Google to comply with dispositions of the directive as transposed in national law – case referred to the French Competition authority.

At this stage, full disclosure of the document is therefore liable, in the context of specific pending proceedings and the sensitivity of the issue, to compromise the protection of legal advice and the interest of the institution in receiving legal advice.

Furthermore, given its relevant links with the pending proceedings, public disclosure of the entire legal opinion would, at this stage, also seriously undermine the proper course of justice and the integrity of the pending court proceedings. I consider that the redacted parts of the requested legal advice prepared in the context of the pending proceedings have a relevant link with the pending national dispute and, if disclosed, may impact the equality of arms.

Consequently, I conclude that the likelihood of the protected interests being compromised by disclosure of the document in its entirety is not hypothetical but genuine and tangible.

Having regard to the above, I consider that the use of the exception provided in the second indent of Article 4(2) (protection of the court proceedings and legal advice) of Regulation (EC) No 1049/2001 is justified, and that access to the limited parts of document 6 must be refused on that basis.

2.3. Protection of the decision-making process

Article 4(3) second subparagraph of Regulation (EC) No 1049/2001 provides that '[a]ccess 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'.

Document 14 is a briefing document prepared for Commissioner Oettinger for his meetings with various press publishers associations, dating from 25 September 2015.

As a preliminary remark, I note that briefings are internal documents intended to give senior management all the relevant information and advice necessary for them to adopt the best course of action in order to serve the objectives of the Commission. For this reason, briefings contain gathered information received in confidence from third parties and various Commission services.

In the case in hand, the redacted parts of the briefing contain preliminary views and reflections, which were under consideration at that time. It contains internal opinions on, among others, the topics of copyright, neighbouring and ancillary rights and lines to take and positions to defend during the meetings for which the document was prepared. Disclosing these limited passages would reveal options under consideration at the time, assumptions regarding the facts analysed and the opinions of the actors involved.

I consider that disclosure of the limited parts in document 14 would seriously affect the cooperation between the services and their hierarchy. Notably, disclosure of the parts containing internal opinions would prejudice the institution's margin of manoeuvre and reduce the capacity of staff to freely express opinions.

The opportunity for staff members to remain free to convey to their hierarchy without being unduly influenced by the prospect of wide disclosure is essential for the smooth functioning of the decision-making process. This is particularly true for an area that is still subject to controversy even considering that the Copyright directive has already been adopted and the decision-making process formally concluded.

Consequently, there is a risk that disclosure would put in the public domain internal opinions and positions, which were not meant for public disclosure and which do not represent the final position of the institution. This, in turn, would seriously undermine the decision-making process in general now and in the future²⁹ by deterring its services and officials from putting forward their views.

In light of the foregoing, I conclude that access to the limited parts of document 14 would undermine the interests protected under Article 4(3) second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

2.4. Protection of the commercial interests

Article 4(2), first indent of Regulation (EC) No 1049/2001 stipulates that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'

Very limited parts of document 17 have to be withheld in application of Article 4(2), first indent of Regulation (EC) No 1049/2001, as this information is commercially and market sensitive. The withheld information contains data specific for Guardian media group and De Pers Group Netherlands business affairs, its relations with third companies and internal information regarding working methods.

I note that this information does not relate to the companies' positions towards EU policy.

The disclosure of these parts would undermine the commercial interests of the companies in question, as it would negatively affect its commercial activity, in particular in the competitive context. It would provide competitors with an unfair advantage as it would give them access to sensitive information internal to the companies.

²⁹ Judgment of the Court of Justice of 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 78 and Judgment of the General Court of 15 September 2016, *Philip Morris v Commission*, T-18/15, EU:T:2016:487, paragraph 87.

The General Court has specifically confirmed on several occasions, that giving access to information particular to an undertaking that reveals its expertise is capable of undermining the commercial interests of this undertaking³⁰.

In this context, I would like to point out that documents disclosed under Regulation (EC) No 1049/2001 become, legally speaking, public documents. Indeed, a document released following an application for access to documents would have to be provided to any other applicant that would ask for it.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned limited information would undermine the commercial interests of the companies involved. I conclude, therefore, that access to the withheld parts of the requested document must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Articles 4(2) and 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 do not raise any specific arguments demonstrating the existence of an overriding public interest.

In the *Port de Brest v Commission* judgment³¹, the General Court confirmed once again that the applicant must rely on specific circumstances to show that there is an overriding public interest, which is able to justify the disclosure of the documents.

In addition, I have not been able to identify any public interest that would outweigh the protection of interests protected under Article 4(2) and Article 4(3) of Regulation (EC) No 1049/2001.

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

4. PARTIAL ACCESS

Please note that partial access is granted to the documents.

³⁰ See Judgment of the General Court of 11 July 2018, *Rogesa v Commission*, T-643/13, EU:T:2018:423, paragraph 70 and Judgment of the General Court of 25 September 2018, *Amicus Therapeutics v European Medicines Agency EMA*, T-33/17, EU:T:2018:595, paragraph 75.

³¹ Judgment of the General Court of 19 September 2018, *Port de Brest v Commission*, T-39/17, EU:T:2018:560, paragraph 104.

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*

Enclosures:

- *Erga omnes* access: (10)
- Applicant restricted access: (2)