



EUROPEAN COMMISSION

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OUT OF SCOPE

EUobserver
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**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 2018/4902**

Dear **OUT OF SCOPE**

I refer to your e-mail of 31 October 2018, registered on the same day, in which you submit 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 (hereinafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 17 September 2018, registered under reference GestDem 2018/4902 and dealt with by the Directorate-General for Agriculture and Rural Development, you requested access to ‘any written record or audio recording of the meetings the Special Committee on Agriculture held in 2017 produced by the Commission (not referring to the summary records produced by the Council)’.

The Directorate-General for Agriculture and Rural Development identified the following documents as falling within the scope of your request:

1. Meeting of the Special Committee on Agriculture, Brussels, 16 January 2017 – Summary record (SI(2017)11, 19.01.2017);

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

² Official Journal L 145 of 31.5.2001, p. 43.

2. Meeting of the Special Committee on Agriculture, Brussels, 13 February 2017 – Summary record (SI(2017)49, 15.02.2017);
3. Meeting of the Special Committee on Agriculture, Brussels, 20 February 2017 – Summary record (SI(2017)71, 23.02.2017);
4. Meeting of the Special Committee on Agriculture, Brussels, 27 February 2017 – Summary record (SI(2017)81, 2.03.2017);
5. Meeting of the Special Committee on Agriculture, Brussels, 13 March 2017 – Summary record (SI(2017)107, 15.03.2017);
6. Meeting of the Special Committee on Agriculture, Brussels, 20 March 2017 – Summary record (SI(2017)118, 22.03.2017);
7. Meeting of the Special Committee on Agriculture, Brussels, 27 March 2017 – Summary record, (SI(2017)138, 03.04.2017);
8. Meeting of the Special Committee on Agriculture, Brussels, 10 April 2017 – Summary record, (SI(2017)164, 20.04.2017);
9. Meeting of the Special Committee on Agriculture, Brussels, 24 April 2017 – Summary record (SI(2017)174, 26.04.2017);
10. Meeting of the Special Committee on Agriculture, Brussels, 15 May 2017 – Summary record (SI(2017)224, 15.05.2017);
11. Meeting of the Special Committee on Agriculture, Brussels, 29 May 2017 – Summary record (SI(2017)289, 1.06.2017);
12. Meeting of the Special Committee on Agriculture, Brussels, 26 June 2017 – Summary record (SI(2017)344, 28.06.2017);
13. Meeting of the Special Committee on Agriculture, Brussels, 10 July 2017 – Summary record (SI(2017)375, 20.07.2017);
14. Meeting of the Special Committee on Agriculture, Brussels, 18 September 2017 – Summary record (SI(2017)429, 19.09.2017);
15. Meeting of the Special Committee on Agriculture, Brussels, 16 October 2017 – Summary record (SI(2017)486, 18.10.2017);
16. Meeting of the Special Committee on Agriculture, Brussels, 06 November 2017 – Summary record (SI(2017)530, 10.11.2017);
17. Meeting of the Special Committee on Agriculture, Brussels, 20 November 2017 – Summary record (SI(2017)563, 21.11.2017).

At the initial stage, the Directorate-General for Agriculture and Rural Development granted partial access to the above-mentioned documents, with the names of the Member States redacted on the grounds of Article 4(3) of Regulation 1049/2001 (protection of the decision-making process). It redacted parts of documents 8 and 13 on the basis of the exception protecting the public interest as regards international relations (Article 4(1)(a), third indent, of Regulation 1049/2001). It refused access to parts of document 17 on the grounds of Article 4(3) of Regulation 1049/2001. Finally, it redacted the personal data that was included in the above-mentioned documents in accordance with Article 4(1)(b) of the same Regulation (protection of the privacy and the integrity of the individual).

In your confirmatory application, you request a review of this position and you put forward a series of arguments in support of your request. These have been taken into account in my assessment, the results of which are detailed below.

You also point out that certain documents that would fall under your request were missing from the file attached to the initial reply.

Please note that, subsequent to your confirmatory application, six additional documents have been identified:

18. Meeting of the Special Committee on Agriculture (SCA), Brussels, 23 May 2017 – Summary record (Ares(2018)5717300);
19. Meeting of the Special Committee on Agriculture (SCA), Brussels, 06 June 2017 – Summary record (Ares(2018)5717128);
20. Meeting of the Special Committee on Agriculture (SCA), Brussels, 4 September 2017 – Summary record (Ares(2018)5717342);
21. Meeting of the Special Committee on Agriculture (SCA), Brussels, 3 October 2017 – Summary record (Ares(2018)5717383);
22. Meeting of the Special Committee on Agriculture (SCA), Brussels, 23 October 2017 – Summary record (Ares(2018)5717474);
23. Meeting of the Special Committee on Agriculture (SCA), Brussels, 4 December 2017 – Summary record (Ares(2018)5717233);

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

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

Following your confirmatory application, the European Commission consulted the Council of the European Union on this request. In its reply, the Council of the European Union underlined that the documents that you seek to obtain reflect solely the author's interpretation of the interventions made during the meetings and do not set any official position of the institutions and the Member States' representatives involved in the

discussions. It did not comment on how the rules laid down in Regulation 1049/2001 would, in its opinion, apply to your request.

Having carried out an assessment of your confirmatory application in light of the provisions of Regulation 1049/2001 and taking into account the outcome of the above-referred consultation, I can inform you that:

- Further partial access is granted to documents 1 to 7, 9 to 12 and 14 to 17. The personal data redacted at the initial stage on the basis of the exception provided for in Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual) remain withheld.
- Partial access is granted to documents 18 to 23, with only personal data redacted on the basis of Article 4(1)(b) of Regulation 1049/2001.
- Further partial access is granted to documents 8 and 13. With regard to the undisclosed parts of these documents, I confirm the initial decision of the Directorate-General for Agriculture and Rural Development to refuse access thereto. The refusal is based on the exception relating to the protection of international relations provided for in the third indent of Article 4(1)(a) of Regulation 1049/2001.

Please find the detailed reasons for the refusal below.

2.1. Protection of the public interest as regards international relations

Article 4(1)(a), third indent, of Regulation 1049/2001 provides that the 'institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations [...]'.³

In your confirmatory application, you do not question the applicability of the above-mentioned exception to the undisclosed parts of documents 8 and 13. Instead, your argumentation is focused on the issue of the disclosure of the identity of the Member States reflected in the documents under the request. Nevertheless, I would like to provide additional explanations of how the public release of the undisclosed parts of the above-mentioned documents would undermine the public interest protected by this exception.

As per settled case law, the disclosure of European Union positions in international negotiations can damage the protection of the public interests as regards international relations³. The above-mentioned exception can be invoked if the disclosure might entail negative repercussions for the European Union's relations with third countries⁴.

³ Judgement of 19 March 2013, *In 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 123.

⁴ Judgement of 7 February 2002, *Aldo Kuijter v Council of the European Union*, T-211/00, EU:T:2002:30, paragraph 65.

Furthermore, the Court of Justice stressed in the *In 't Veld* ruling that the institutions ‘must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest’⁵.

Consequently, ‘the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exception [...] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’⁶.

Documents 8 and 13, which contain certain parts relating to international negotiations between the European Union and third countries, have been examined in light of the above-mentioned case law.

The relevant undisclosed parts of document 8 contain the views of the Member States on the approach proposed by the European Commission following the Court ruling in the *Polisario Front* case⁷. It also contains sensitive comments regarding the implications of this judgement in the context of the relations between the European Union and the Kingdom of Morocco.

The public release of these elements might harm bilateral relations with the Kingdom of Morocco and further compromise the negotiations on the European Union-Morocco Agreement⁸, which have not yet been finalised. Indeed, discussions are currently being held both at bilateral level with the authorities of this country and also in the European Parliament. Furthermore, the disclosure of this information could undermine the climate of mutual trust between the European Union and the Kingdom of Morocco, which is necessary to ensure the smooth conduct of the negotiations and the implementation of the Association Agreement with this country⁹.

The relevant undisclosed parts of document 13 contain information on the strategy of the European Union in the context of World Trade Organisation negotiations on agricultural matters and the related concerns raised by the Member States. Public access to this information would reveal strategic objectives of the Union that are relevant in the framework of ongoing and future World Trade Organisation negotiations. This would, in turn, undermine the position of the Union in these negotiations, notably as regards the next ministerial conference, which will be held in Kazakhstan in June 2020.

Against this background, there is a risk that the public release of the relevant withheld parts of documents 8 and 13 would have an adverse impact on ongoing negotiation procedures with third countries and would negatively affect the position of the European

⁵ Judgment of 3 July 2014, *Council v In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁶ Judgment of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

⁷ Judgement of 21 December 2016, *Council of the European Union v Polisario Front*, C-104/16 P, EU:C:2016:973.

⁸ COM/2018/481 final/2.

⁹ OJ L 70, 18.3.2002, p. 2.

Union in the context of international trade negotiations. I consider this risk as reasonably foreseeable and non-hypothetical, given the sensitivity of the discussions with the Kingdom of Morocco, and the relevance of the above-referred Union's negotiating position in the Twelfth Ministerial Conference of the World Trade Organisation.

Consequently, I consider that the relevant undisclosed parts of the above-mentioned documents are protected against public disclosure, pursuant to the exception provided for in Article 4(1)(a), third indent of Regulation 1049/2001.

2.2. Protection of privacy and integrity of the individual

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data'.

The applicable legislation in this field is Regulation (EC) No 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/EC¹⁰ (hereafter 'Regulation 2018/1725').

The documents identified under your request, including the documents identified at confirmatory level, contain personal data, in particular the names, surnames, functions and contact details of staff members of the European Commission who do not hold any senior management positions. Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data¹¹.

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹², the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹³.

Pursuant to Article 9(1)(b) of Regulation 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

¹⁰ Official Journal L 205 of 21.11.2018, p. 39.

¹¹ Judgment of 20 December 2017, *Peter Novak v Data Protection Commissioner*, C-434/16, request for a preliminary ruling, EU:T:2018:560, paragraphs 33-35.

¹² Judgment of 29 June 2010, *Commission v the Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378.

¹³ Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

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 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established 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 subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note 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 under the request, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I must conclude that, pursuant to Article 4(1)(b) of Regulation 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.

3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered whether partial access could be granted to the documents that you seek to obtain.

As stated above, further partial access is herewith granted to documents 1 to 7, 9 to 12 and 14 to 17. In addition, partial access is granted to documents 18 to 23.

The undisclosed parts of the above-mentioned documents contain personal data and cannot be released for the reasons set out in section 2.2 above.

With regard to documents 8 and 13, I consider that further access to the undisclosed parts of these documents would undermine the protection of the public interest as regards international relations for the reasons described in section 2.1 above. These parts are

entirely covered by the exception laid down in Article 4(1)(a), third indent, of Regulation 1049/2001 (protection of international relations). Consequently, no meaningful further partial access to those documents is possible without undermining the interests protected by this exception.

4. 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
Martin SELMAYR
Secretary-General

Enclosures: (23)