



EUROPEAN COMMISSION

Brussels, 19.12.2019

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28028 Madrid

Spain

**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 2019/1804**

Dear ██████████,

I refer to your email of 9 July 2019, 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 (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 23 March 2019, addressed to the Directorate-General for Migration and Home Affairs, you requested access to ‘the statistical information provided to the European Commission by the Passenger Information Units of France, Germany and the United Kingdom under Article 20 of Directive (EU) 2016/681, covering as a minimum the total number of passengers whose Passenger Name Record data have been collected and exchanged and the number of passengers identified for further examination’.

The European Commission has identified the following European Commission’s documents as falling under the scope of your request:

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

- France- Statistics on Passenger Name Record (Ares(2019)35120969, hereafter ‘document 1’);
- Germany- Statistics on Passenger Name Record (Ares(2019)93511935, hereafter ‘document 2’);
- United Kingdom- Statistics on Passenger Name Record (Ares(2019)3512195, hereafter ‘document 3’).

In its initial reply of 19 June 2019, the Directorate-General for Migration and Home Affairs refused access to these documents based on the exceptions of Article 4(1)(a) first indent (protection of the public interest as regards public security) and of Article 4(3), first subparagraph (protection of ongoing decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. Your arguments have been taken into account in our assessment, the results of which are explained 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 fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of Directorate-General for Migration and Home Affairs to refuse access to the requested documents, based on the exception of Article 4(1)(a) first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001, for the reasons set out below. In addition, access to the requested documents has to be refused also on the basis of Article 4(1)(a), third indent (protection of the public interest as regards international relations) and Article 4(2), second indent (protection of court proceedings) of the Regulation.

In accordance with the case-law of the Court of Justice, the European Commission, ‘when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation No 1049/2001’³. The Court has also held that several exceptions can as in the present case, be closely connected⁴.

As a preliminary remark relevant to all four exceptions please note that if access is granted to a document under Regulation (EC) No 1049/2001, this document becomes accessible to the public at large.

³ Judgment of the General Court of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 34.

⁴ Ibid.

2.1. Protection of the public interest as regards public security

Article 4(1)(a) first indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the public interest as regards [...] public security [...]'].

Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime⁵ (hereafter 'Directive (EU) 2016/681') is an essential instrument in the European Union's response to the threat of terrorism and serious crime. As indicated in your original request, Article 20 of Directive (EU) 2016/681 requires the Member States to provide, on a yearly basis, with a set of statistical information on passenger name record data provided to their Passenger Information Units.

In your confirmatory application, you state that the statistics contained in the documents cannot possibly contain 'sensitive information', as argued in the initial reply, because Directive (EU) 2016/681 explicitly prohibits the processing of sensitive data. In this respect, I would like to stress that the term 'sensitive' does not allude to 'sensitive [personal] data' and that the notion of sensitive information used is to be understood as referring to knowledge and security sensitive information that, if disclosed, may result in a loss or harm to public security.

The requested documents provide quantitative information on the amount of passenger name record data collected by the Passenger Information Units of France, Germany and the United Kingdom, the total number of passengers identified for further examination and the number of requests received by the Passenger Information Units from the national competent authorities and from other Member States. This information would allow the recipient, and the wider public, to draw comparisons among the Member States concerned and, in combination with publicly accessible data (for example on passenger numbers), draw inferences on the relative development of passenger name record processing capabilities in the Member States. Such inferences could refer, for example, to the degree of coverage of passenger name record data collection in relation to passenger flows, the results achieved by the Passenger Information Units through the processing of passenger name record data and the volume of information exchanged both at national and EU levels. It is not possible to give more details justifying the need for confidentiality in respect of the requested documents without disclosing their content and, thereby, depriving the exception of its very purpose⁶.

⁵ OJ L 119, 4.5.2016, p. 132-149.

⁶ Judgment of the General Court of 8 February 2018, *Pagpyrios organismos ageladotrofon v European Commission*, T-74/16, EU:T:2018:75, paragraph 71.

It is widely recognised that individual criminals and criminal groups are highly flexible and able to quickly adjust their methods of working to changes in the environment, including to evade countermeasures⁷. In this respect, there is a credible risk that criminals or terrorists may use any operational information available on Member States' passenger name record systems, including the statistics contained in the requested documents, to adapt their travel patterns in order to avoid detection, in particular when moving within the Schengen Area without internal borders.

Such risk deserves particular attention in view of the terrorist threat, which remains high⁸. In this context, please also note that the Court of Justice has specifically recognised that disclosure of information related to the fight against terrorism undermines the public security⁹.

Finally, please note that the General Court has acknowledged that 'the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exceptions 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'¹⁰.

Moreover, the General Court recently ruled that, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, 'it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation'¹¹.

I thus conclude that the requested documents cannot be disclosed, at this stage, pursuant to the exception which is set out in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

⁷ See for example the 'European Union Serious and Organised Crime Threat Assessment (SOCTA) 2017' elaborated by Europol.

⁸ Europol, European Union Terrorism Situation And Trend Report 2019.

⁹ Judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05, EU:C:2007:75, paragraph 66.

¹⁰ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council of the EU*, T-264/04, EU:T:2007:114, paragraph 40.

¹¹ Judgment of the General Court of 11 July 2018, *Client Earth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23.

2.2. Protection of the public interest as regards international relations

Article 4(1)(a) third indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the public interest as regards [...] international relations [...]'].

As far as the protection of international relations is concerned, the Court of Justice has acknowledged that the institutions enjoy a wide discretion when considering whether access to a document may undermine that public interest¹².

The issue of passenger name record data transfers is highly sensitive with respect to the EU international relations with third countries. The referral by the European Parliament of the envisaged 2014 EU-Canada passenger name record agreement to the Court of Justice, and the ensuing Opinion of the Court in this case,¹³ give proof of this sensitivity.

The EU is currently in the midst of conducting discussions on passenger name record with a number of third countries. In December 2017, the Council authorised the European Commission to negotiate a new passenger name record agreement with Canada,¹⁴ which is still pending finalisation. In addition, the European Commission is currently performing a joint evaluation and a joint review of the EU passenger name record agreement with Australia,¹⁵ and a joint evaluation of the EU passenger name record agreement with the United States.¹⁶ At the global level, the International Civil Aviation Organisation has taken steps to develop new standards for the collection, use, processing and protection of passenger name record data, as mandated by the United Nations Security Council Resolution 2396 in 2017.¹⁷ Within the context of these discussions, the EU international partners have showed an interest in getting access to the passenger name record statistics submitted by the Member States. The European Commission has refused these requests, alleging that this information is confidential.

Consequently, the statistical information contained in the requested documents needs to be considered as an element within the European Union's strategy regarding ongoing exchanges with third countries on passenger name record.

¹² Judgment of the Court of First Instance of 25 April 2007, in Case T-264/04, WWF European Policy Programme v Council, , EU:T:2007:114, paragraph 40.

¹³ Opinion 1/15 of the Court (Grand Chamber) of 26 July 2017.

¹⁴ Council document 15567/17.

¹⁵ Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service, OJ L 186, 14.7.2012, p. 4–16.

¹⁶ Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, OJ L 215, 11.8.2012, p. 5–14.

¹⁷ Resolution 2396 on 'Threats to international peace and security caused by terrorist acts' adopted by the Security Council on 21 December 2017.

In particular, the European Commission's refusal to provide access to the Member States' passenger name record statistics to international partners will become devoid of purpose if the requested documents become publicly available. In a context where passenger name record is subject to difficult international discussions, disclosing Member States' statistics on the operation of their passenger name record systems to third countries poses a serious risk to the European Union's interests and negotiating position.

In the light of the above, I conclude that there is a reasonable risk that public disclosure of the document concerned is likely to harm the interest protected by Article 4(1)(a), third indent of Regulation (EC) No 1049/2001.

2.3. Protection of court proceedings

Article 4(2) second indent of Regulation 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings and legal advice [...] unless there is an overriding public interest in disclosure'.

In its judgement in Case [T-84/03](#), the Court of First Instance¹⁸ underlined that the exception provided for in Article 4(2), second indent, protects two distinct interests: court proceedings and legal advice¹⁹. In the case at hand, the refusal of access to the documents concerned is based on a need to protect pending court proceedings.

On 17 October 2019, the Belgian Constitutional Court submitted a reference for a preliminary ruling on Directive (EU) 2016/681 to the Court of Justice²⁰. The questions referred to the Court of Justice concern, in particular, the compatibility of that Directive with the right to respect for private life and the protection of personal data. Directive (EU) 2016/681 and its national implementing measures have been challenged before the national courts of Austria²¹ and Germany²² in cases that also seek to trigger referrals to the Court of Justice. The statistics on passenger name record provided by the Member States, including those contained in the requested documents, are likely to feature among the elements considered by the Court when assessing the necessity and proportionality of the measure in any cases brought before it.

¹⁸ Currently: the General Court.

¹⁹ Judgment of the Court of first Instance of 23 November 2004, [T-84/03](#), *Turco v Council*, EU:T:2004:339, paragraph 65.

²⁰ Arrêt n° 135/2019.

²¹ Epicenter.works, 'Our PNR complaint to the federal administrative court', 8 October 2019, available at: <https://en.epicenter.works/content/our-pnr-complaint-to-the-federal-administrative-court> [last accessed on 28 October 2019].

²² Complaint and application for a temporary injunction in relation to: the storage, processing and transfer of passenger data pursuant to the Passenger Name Record Act (FlugDaG), Wiesbaden Administrative Court, 13 May 2019.

I would like to underline, however, that in the judgment in Case T-796/14, the Court confirmed the applicability of the above-mentioned exception, not only to submissions, but also to documents which ‘have a relevant link either with a dispute pending before the Courts of the European Union, [...] or with proceedings pending before a national court, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely’²³.

Public disclosure of the requested documents, at this stage, would therefore seriously undermine the proper course of justice and there is a real and non-hypothetical risk that its release would adversely and seriously affect the court proceedings in the meaning of Article 4(2), second indent, of Regulation (EC) No 1049/2001 with regard to the court proceedings pending before the national and EU courts.

Against this background, I consider that public access to the documents requested has to be refused on the basis of Article 4(2), second indent of Regulation (EC) No 1049/2001 (protection of court proceedings).

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1)(a) 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.

The exception laid down in Article 4(2) 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.

As confirmed by the General Court in the *Franchet and Byk* judgment, ‘[...] the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him. Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account’²⁴.

This was further confirmed by the Court of Justice in Case C-266/05 (*Sison v Council*) where it held that ‘the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected by Article 4(1)(a) of Regulation No 1049/2001 and to refuse, if that is the case, the access requested’²⁵.

²³ Judgment of the General Court 15 September 2016, T-794/14, *Philip Morris vs European Commission*, EU:T:2016:483, paragraph 64.

²⁴ Judgement of the General Court of 6 July 2006, *Franchet and Byk v Commission*, Joined Cases T-391/03 and T-70/04, EU:T:2006:190, paragraphs 136 and 137.

²⁵ Judgement in *Sison v Council*, cited above, paragraph 47.

Even if members of the public have indeed expressed an interest in the subject matter covered by the documents requested and have pointed to a general need for public transparency related thereto, I would like to refer again to the judgment in the *Strack* case²⁶, where 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. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure²⁷.

Based on my own analysis, I have not been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect court proceedings, as provided in the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

As explained in details above, this is precisely the type of information contained in this decision, the public disclosure of which would undermine the protection of the public interest as regards public security, international relations and court proceedings, respectively, Article 4 (1)(a) first and third indents and Article 4(2), second indent of Regulation (EC) No 1049/2001.

Consequently, I note that no meaningful partial access is possible without undermining the above-mentioned protected interests and that the documents must be protected in their entirety.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Article 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission




²⁶ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 128.

²⁷ Ibid, paragraph 129.