Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – EASE 2024/1487

Dear Mr Teffer,

I am writing in reference to your confirmatory application registered on 11 April 2024, submitted in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for the delay in replying to your request.

1. **Scope of Your Request**

An initial application was registered on 18 March 2024 under reference number EASE 2024/1487, as a result of your request to:

‘the source code of the ‘one in one out’ calculator’.

Unit SG.C.5 ‘Digital Solutions & Process Efficiency’ of the Secretariat-General, which was responsible for preparing the initial reply, informed you on 10 April 2024 that it could not identify any documents under the relevant provisions of Regulation (EC) No 1049/2001.

In your confirmatory application you contest this position.

2. **Assessment and Conclusions under Regulation (EC) No 1049/2001**

Following your confirmatory application, the Secretariat-General has carried out a renewed search for the documents requested. Following this renewed search, the Secretariat-General

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confirms that the Commission does not hold any documents that would correspond to the description given in your application.

In your confirmatory application, you argue that ‘the one-in one-out calculator software generates results which DO relate to policies, activities and decisions, because the Commission uses the calculator in its effort to achieve better regulation. It is different from software that for example the Commission uses to write emails, in that choices have been made in the source code, potentially choices that have an effect on legislation. […]’ Furthermore, the European Commission in the past *has* published source codes in response to requests made under Regulation 1049/2001. See for example the application from 02/03/2016 registered under reference number GestDem 2016/1030. The requested had asked for the computer source code for the European Data Portal[…]. Finally, I’d also like to remind you that in my initial application I wrote that publishing the source code would be in line with the Commission’s Open Source Software Strategy 2020-2023, titled "Think Open", which was meant to reinforce "the Commission’s internal working culture that is already largely based on the principles of open source”.’

In the first place, as explained by unit SG.C.5 of the Secretariat-General, the source code is the programming language ran by the OIOO calculator for applying the methodology to encode costs and savings and it is neither an algorithm nor a methodology. That methodology is available in Tool #58 and #59 of the better regulation toolbox³. The source code thus refers exclusively to the software and its technical features and not to any policy, activity or decision falling within the institution’s sphere of responsibility.

The software enables the methodology to operate and constitutes the mathematical function that converts the input data into meaningful output information. It is therefore clear that the source code contained in the software is distinct from the content generated by the calculator and methodology. As such, the source code instructs the software how to function. The latter, in turn, enables the calculations as defined in the methodology to be performed. The resulting content may relate to the policies of the institution.

Therefore, the source code cannot be considered as concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility, as provided for in Article 3(a) of Regulation (EC) No 1049/2001.

Against this backdrop, the source code does not qualify as a ‘document’ within the meaning of point a) of Article 3 of Regulation (EC) No 1049/2001.

In the second place, it must be noted that, in the framework of the past request Gestdem 2016/1030, to which you refer in your application and which dates back to 2016, the service responsible at the initial stage, the Directorate-General for Communications Networks, Content and Technology had merely referred the applicant to the public link where the source code of the European Data Portal had been proactively made public. This cannot be

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considered as a position of principle of the institution to systematically disclose the source
codes of any software/application/methodology it is currently employing or developing.

In addition, please note that the solutions taken in the context of various requests for public
access to documents submitted under Regulation (EC) No 1049/2001 depend on the specific
circumstances of the case in question, following an examination of the service in charge.

Please note that the General Court held in Case T-468/16 (Verein Deutsche Sprache v
Commission) that there exists a presumption of lawfulness attached to the declaration by the
institution asserting that documents do not exist\(^4\). This presumption continues to apply
unless the applicant can rebut it by relevant and consistent evidence\(^5\).

Given that the European Commission does not hold any document corresponding to the
description given in your application, it is not in a position to fulfil your request.

Finally, in your application you argued that publishing the source code would be in line with
the Commission's Open-Source Software Strategy 2020-2023, entitled "Think Open"\(^6\). In
this regard, it must be noted that the Commission Decision on the open-source licensing and
reuse of Commission software\(^7\) does not create any obligation for Commission services to
share Commission software under an open-source licence nor any right for third parties to
require Commission software to be made available under an open source licence. The
Commission therefore remains free to decide whether to share its software or not.

3. **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 and/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,

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\(^4\) Judgment of the General Court of 23 April 2018, Verein Deutsche Sprache v Commission, T-468/16,

\(^5\) Ibid.


\(^7\) Commission Decision of 8 December 2021 on the open source licensing and reuse of Commission
software (2021/C 495 I/01).