



EUROPEAN COMMISSION

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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT  
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2016/2404**

Dear Mr Milanese,

I refer to your e-mail of 15 June 2016, registered on 29 June 2016, 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 documents<sup>2</sup> ('Regulation 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 2 May 2016, you requested access to:

- the [d]ocuments containing information supplied by the United Kingdom as evidence of an exceptional situation, as referred to in paragraph 2 of the Commission Declaration on the safeguard mechanism regarding the freedom of movement for workers, provided in the framework of the proposed 'New Settlement for the UK within the EU' of 19 February 2016<sup>3</sup>;

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

<sup>3</sup> *The European Commission considers that the kind of information provided to it by the United Kingdom, in particular as it has not made full use of the transitional periods on free movement of*

- all preparatory documents leading the Commission to reach the conclusion that *'the type of exceptional situation that the safeguard mechanism is intended to cover exists in the United Kingdom today'*. This shall include the Commission's own analysis based on labour market statistics and studies by third parties;
- [a]ny notes and evidence to back up the declaration supplied to the representatives of Member States in the European Council, their reactions and extracts from any minutes of meetings where the safeguard mechanism was discussed.

In its initial reply of 27 May 2016, the Task Force for Strategic Issues related to the UK Referendum (UKTF) refused access to the documents falling under the scope of your request, based on the exception of Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position. You strive to demonstrate the existence of an overriding public interest in disclosure of the requested documents. I will address your arguments in the sections below.

## **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 or service concerned at the initial stage.

Following this review, I regret to inform you that the refusal of the UKTF to grant access has to be confirmed, based on the exceptions of Article 4(3), first subparagraph (protection of the decision-making process), Article 4(1)(a), fourth indent (protection of the financial, monetary or economic policy of the Union or a Member State) and Article 4(1)(b) (protection of the privacy and the integrity of the individual), of Regulation 1049/2001, as explained below.

### **2.1. Protection of the decision-making process**

Article 4(3), first subparagraph of Regulation 1049/2001 provides that *[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

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*workers which were provided for in recent Accession Acts, shows the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today*, European Council conclusions of 18-19 February 2016, Annex VI, Declaration of the European Commission, paragraph 2.

The documents which you seek to obtain contain non-public considerations and exchanges. They reflect preliminary opinions from Member States and different options discussed in relation to sensitive matters concerning a possible new settlement for the United Kingdom within the EU. The documents include negotiation positions and supporting arguments, including non-public data.

While the documents requested were drawn up in the context of the establishment of a new settlement for the United Kingdom within the EU, and the latter ceased to exist following the outcome of the UK referendum of 23 June 2016, a new decision-making process has started which would be seriously undermined if these documents were disclosed. Indeed, the Commission's (and more broadly, the Union's) decision-making process concerning the preparation of the negotiations with the United Kingdom on the arrangements for the latter's withdrawal from the Union is ongoing (hereinafter, 'the negotiations').

After this preparatory period, Article 50 of the Treaty on the European Union sets out the procedure to be followed if a Member State decides to leave the Union. Therefore, another decision-making process concerning the actual negotiations with the United Kingdom will start once the Article 50 process is triggered by a notification from the withdrawing state.

The issues discussed in the documents requested are relevant in the context of the current decision-making process regarding the preparation of the negotiations, and beyond. Disclosure of any documents, in part or in full, which contain preliminary reflections and negotiation positions as described above, would significantly restrict the Commission's and the Member States' ability to act unrestrainedly in its future discussions in the context of Article 50 TEU. This, in turn, would seriously undermine the Commission's and the Member States' margin of manoeuvre in the future negotiations and, hence, its decision-making process concerning the preparation of the negotiation and the actual negotiation of the arrangements for the withdrawal of the United Kingdom from the Union. It would also potentially result in the content of these documents being misunderstood or misused, thereby impairing the serenity of the ongoing decision-making process.

The sensitive and unprecedented process of preparing and conducting negotiations with the United Kingdom on the arrangements for the latter's withdrawal from the Union does indeed merit thorough reflection. To that end, the Commission and the Member States should remain free to undertake preliminary reflections without any external interference.

I refer in this regard to the recent judgement of the General Court in Joint Cases T-424/14 and T-425/14, where the Court has acknowledged the existence of a general presumption that access to such preliminary documents is to be refused:

*[...] for the purposes of applying the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission is entitled to presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously undermine its decision-making process for developing a policy proposal.*

*[...] it must be held that the general presumption may apply for as long as the Commission has not made a decision regarding a potential policy proposal, that is to say, until a policy initiative has been, depending on the circumstances, either adopted or abandoned.<sup>4</sup>*

Whilst this judgment specifically concerned documents drafted in the framework of the completion of an impact assessment, the reasoning of the Court applies, *mutatis mutandis*, to other documents drafted as part of preliminary reflections and discussions on possible policy options, especially where they are relevant in the context of discussions on the sensitive issue of the negotiations pursuant to Article 50 TEU.

Furthermore, some of the documents requested originate from the UK authorities. Public disclosure of the information provided by the UK authorities, in confidence, on issues which will be relevant in the future negotiations, would seriously undermine the Commission's (and more broadly, the Union's) decision-making process concerning the preparation and conduct of the future negotiations. Indeed, in order to conduct the future negotiations with the United Kingdom effectively, a climate of mutual trust between the sides must be ensured throughout this sensitive and unprecedented process and earlier negotiation positions relevant for future discussions must remain confidential.

The British Prime Minister May publicly announced that the UK Government would formally notify the European Council of the UK's intention to withdraw from the Union by the end of March 2017. The risk that public disclosure of the information contained in the documents would negatively influence the preparation and future negotiations with the authorities of the United Kingdom is reasonably foreseeable and not purely hypothetical.

Consequently, I conclude that access to the requested documents has to be refused, based on Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

## **2.2. Protection of the financial, monetary or economic policy of the European Union or a Member State**

Article 4(1)(a), fourth indent of Regulation 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 [...] the financial, monetary or economic policy of the Union or a Member State.*

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<sup>4</sup> Judgement of the General Court of 13 November 2015 in Joined Cases T-424/14 and T-425/14, *ClientEarth v Commission*, paragraphs 97 and 99.

As explained above, the documents requested include earlier negotiation positions and supporting arguments, including non-public data, on delicate matters which are relevant throughout the process of preparing, and conducting, the future negotiations with the United Kingdom. Disclosure of any documents reflecting this information would give rise to undue speculation and premature conclusions as regards sensitive issues which touch upon the heart of the European integration, including the functioning of the internal market. This, in turn, would not only pose a threat to the financial, monetary and economic stability of the European Union, but also to that of individual Member States.

### **2.3. Protection of privacy and the integrity of the individual**

Article 4(1)(b) of Regulation 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.*

The documents requested contain the names of individuals<sup>5</sup>. These data constitute personal data within the meaning of Article 2(a) of Regulation 45/2001<sup>6</sup>, which defines personal data as *any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.*

In consequence, the public disclosure of these data in the requested documents would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling<sup>7</sup>, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.<sup>8</sup> Only if both conditions are fulfilled and the processing is lawful in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

I would also like to bring to your attention the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that *whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the*

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<sup>5</sup> Including Commission officials not forming part of senior management.

<sup>6</sup> 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.

<sup>7</sup> Judgment in *Commission v Bavarian Lager*, case C-28/08 P, EU:C:2010:378.

<sup>8</sup> *Ibid.*, paragraphs 77 to 78.

*transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access.*<sup>9</sup> I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data<sup>10</sup>.

Neither in your initial, nor in your confirmatory application, have you established the necessity of, nor any interest in, disclosing any of the above-mentioned personal data. Therefore, I have to conclude that the transfer of personal data through the disclosure of the requested documents cannot be considered as fulfilling the requirement of Regulation 45/2001. Consequently, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as, based on the information at my disposal, there is no need to publicly disclose the personal data included therein and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(3) (protection of the decision-making process) of Regulation 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 argue that [t]he assertion that there is an exceptional pressure on UK public services caused by EU migration will have implications after the referendum in the case both of a remain or a leave vote in the context of discussions on the relationship between the UK and the rest of the EU, and the fate of EU workers currently in the UK. Therefore the overwhelming public interest in seeing and evaluating this evidence will remain after the 23rd June.*

While I agree that there may be a public interest in granting access to the supporting arguments and *evidence* you refer to, I consider that, in this case, the public interest is best served by avoiding taking any measure such as disclosing these documents which would negatively affect or undermine the above mentioned decision-making processes concerning the preparation of the future negotiations with the United Kingdom on the arrangements for the latter's withdrawal from the Union, and the actual negotiations. It is in the public's interest that the negotiations pursuant to Article 50 TEU are conducted effectively.

In consequence, I consider that, in this case, there is no overriding public interest that would outweigh the interest in safeguarding the protection of the ongoing decision-making process based on Article 4(3) of Regulation 1049/2001.

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<sup>9</sup> Judgment in *ClientEarth and PAN Europe v EFSA*, case C-615/13 P, EU:C:2015:489, paragraph 47.

<sup>10</sup> Judgment in *Strack v Commission*, case C-127/13 P, EU:C:2014:2250, paragraph 106.

Please note also that Articles 4(1)(a) and 4(1)(b) of Regulation 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

#### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, no meaningful partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of access.

#### **5. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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  
Alexander ITALIANER  
Secretary-General*