



EUROPEAN COMMISSION

Brussels, 20.7.2018  
C(2018) 4948 final

Ms Anne FRIEL  
Client Earth  
Rue du Trône 60  
1050 Brussels

**DECISION OF THE EUROPEAN 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 2018/2076**

Dear Ms Friel,

I refer to your email of 22 June 2018, registered on 25 June 2018, by which you lodge a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> (hereafter ‘Regulation 1049/2001’).

**1. SCOPE OF YOUR REQUEST**

By your initial application of 11 April 2018, you had requested ‘access to the following:

1. Documents related to the total allowable catches [...] for fish stocks in the Northeast Atlantic for 2018, specifically:
  - Any records, minutes or notes of meetings/discussions that took place between the Commission and the Member State representatives on the [total allowable catches] for 2018, including any minutes or notes of Council working party/ministerial meetings taken by Commission staff, and any internal Commission briefings on the subject. We do not seek access to the Commission's legislative proposals for the 2017 [total allowable catches], unless such documents are annotated and/or contain negotiation directives. We also do not seek access to the documents that were publicly available in the Council's

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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 31.05.2001, p. 43.

document register, filed under interinstitutional code 2017/0287 (NLE) at the date of this request;

- a full table of all proposed and agreed quota top-ups (in tonnes and %) and [total allowable catches] before the top-ups were applied;
  - a detailed description of the methodology used to calculate quota top-ups;
  - the calculations that the proposed and agreed quota top-ups were based on, ideally in Excel spreadsheet format.
2. Any documents relating to exemptions from the landing obligation, within the period following the review by [the Expert Working Group of the Scientific, Technical and Economic Committee for Fisheries] of the joint recommendations in July 2017 until the adoption of the discard plans for 2018 in November 2017, including any correspondence between the Commission and the Member States and any records, minutes or notes of meetings/discussions that took place between the Commission and the Member State representatives regarding this matter.’

Through its initial reply, the Directorate-General for Maritime Affairs and Fisheries gave you full access to five documents in three different stages<sup>3</sup>.

Through your confirmatory application, you request a review of the position of the Directorate-General for Maritime Affairs and Fisheries. You put forward that ‘the documents disclosed were not labelled, dated or explained’ and that you have ‘serious cause to believe that the Commission is in possession of other documents’ falling under the scope of your request than those disclosed at the initial stage. You put forward a number of arguments to support your request. These have been taken into account in our assessment, of which the results are described 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 concerned at the initial stage.

Subsequent to your confirmatory application, the European Commission has carried out a renewed, thorough search for any further documents that would fall under the scope of your request. Following this renewed search, the European Commission identified indeed further documents falling under the scope of your request.

Considering that no list of documents was transmitted to you at the initial stage, please find attached such a list that contains all documents falling under the scope of your request, including the title, date and author (see List of documents).

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<sup>3</sup> By e-mails of 15 May 2018 (Ares(2018)2870960), 17 May 2018 (Ares(2018)2871079) and 1 June 2018 (Ares(2018)2870557).

In this regard, the following documents were transmitted to you at the initial stage: the sixth sub-content of Document 7, the fifth annex to document 8 as well as documents 9, 10 and 11.

Consequently, please find attached the remaining documents, namely documents 1, 2, 3, 4, 5, 6, 8 and 12 as well as the first five sub-contents of Document 7. With regard to document 12, please note that we enclose for your convenience a copy of it, but that it is already publicly available at the following address:

<http://scientiamarina.revistas.csic.es/index.php/scientiamarina/article/view/1722>.

With regard to documents 5, 6 and 8, please note that wide partial access is granted to these documents, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual), for the reasons set out below.

Article 4(1)(b) of Regulation 1049/2001 provides that ‘the 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 requested documents contain personal data such as names of natural persons not occupying any senior management position in the European Commission or not being a main representative of the third party in question, or information from which their identity can be deduced.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001<sup>4</sup> (hereafter ‘Data Protection Regulation’) becomes fully applicable<sup>5</sup>.

Article 2(a) of the Data Protection Regulation provides that personal data ‘shall mean any information relating to an identified or identifiable 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’. According to the Court of Justice, ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of “private life”’<sup>6</sup>. The names<sup>7</sup> 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 2(a) of the Data Protection Regulation.

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<sup>4</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, Official Journal L 8 of 12 January 2001, page 1.

<sup>5</sup> Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 63.

<sup>6</sup> Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>7</sup> Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. 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 constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In its judgment in the *ClientEarth* case, 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 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>.

In your confirmatory request, you do not establish the necessity of having the data in question transferred to you.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

Therefore, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

Please also note that document 6 contains a part of text that was redacted because it is out of the scope of your request. This part of the document is clearly labelled as being out of scope and is indeed a purely internal transmission e-mail.

### **3. PARTIAL ACCESS**

As indicated above, wide partial access is granted to three documents identified, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual). The remaining documents are fully disclosed.

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<sup>8</sup> Idem, paragraphs 77-78.

<sup>9</sup> Judgment of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

<sup>10</sup> Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

#### **4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note that Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure.

#### **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  
Martin SELMAYR  
Secretary-General*

Enclosures: 10

