



EUROPEAN COMMISSION

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C(2019) 7409 final

Ms Estela Casajuana
Radarweg 505
1043NZ Amsterdam
The Netherlands

**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 2019/1350**

Dear Ms Casajuana,

I refer to your email of 13 June 2019, registered on 14 June 2019, 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').

Please accept our apologies for this late reply.

In your initial application of 5 March 2019, you submitted a request for access to the following documents, I quote:

- [...] documents in relation to the implementation of the EU Regulations No. 514/2014 (laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management) and the EU Regulation No. 515/2014 (establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa).

Article 55(7) of the EU Reg. No 514/2014 establishes that the Commission shall pay particular attention to the monitoring and evaluation of actions and programmes related to third countries, in accordance with Article 8.

The Interim Evaluation of the Internal Security Fund - Borders and Visa 2014-2017 (SWD(2018) 340 final) states that some Member States have declared to have

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

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

implemented projects related to third countries, but the evaluation does not provide any further detail/further information on such projects’.

More specifically, you asked for, I quote:

- ‘1. A record of actions/projects implemented in, or in relation to a third country that received funding from the ISF-Borders and VISA, including information on the amount the EU contributed to the project, the beneficiaries and the project number. We are particularly interested in actions that have supported the implementation of the Seahorse Network.
- 2. Any documents produced by the European Commission for the purpose of “paying particular attention to the monitoring and evaluation of actions and programmes related to third countries, in accordance with Article 8” - therefore implementing the obligation set up by article 55(7) of the EU Reg. No 514/2014, besides the information already included in the interim evaluation report, which is already publicly available’.

In its initial reply of 15 May 2019, the Directorate-General for Migration and Home Affairs informed you that the European Commission does not hold any documents that would correspond to the description given in your application. It further informed you that any record of actions or projects having received funding via the shared management modality (national programmes) is owned, and published, by EU Member States.

In your confirmatory application, you request the European Commission to reconsider its position on the basis that it has not given any reasons with regards to the second point of your application. Moreover, you request that, I quote, ‘the Commission to show that it has carried out a concrete assessment regarding the second point of [your] request and that supports its assessment with clear and unequivocal reasons, so as to enable [you] to protect our right to public access to documents’.

Therefore, I understand from your confirmatory application that you request the review performed by the Secretariat-General to be limited to the second point of your initial request, namely ‘[a]ny documents produced by the European Commission for the purpose of “paying particular attention to the monitoring and evaluation of actions and programmes related to third countries, in accordance with Article 8” - therefore implementing the obligation set up by article 55(7) of the EU Reg. No 514/2014, besides the information already included in the interim evaluation report, which is already publicly available’.

In this context, the European Commission has carried out a renewed, thorough search for the documents requested.

Following this renewed search, I confirm that the European Commission does not hold any documents that would correspond to the description given in your application.

Please note that the two points of your initial application are inter-linked. As already explained by the Directorate- General for Migration and Home affairs, any record of actions or projects having received funding via the shared management modality (national

programmes) is owned, and published, by EU Member States. Likewise, lists of projects awarded or financed via the shared management modality are owned, and published as well by EU Member States.

You may find information regarding national programmes available in the attached explanatory annex.

In your application you ask for access to ‘[...] documents produced by the European Commission for the purpose of “paying particular attention to the monitoring and evaluation of actions and programmes related to third countries, in accordance with Article 8[...]’.

Regarding this point, I note that Article 8 of Regulation 514/2014³, referred to in your application, covers only Union actions and emergency assistance directly implemented by the European Commission (via direct management modality).

As far as these actions implemented in direct management are concerned, since no specific ‘action or project’, as referred to in your application, was funded under Internal Security Fund-Borders Union actions in relation to third countries, the Directorate-General for Migration and Home Affairs did not draft any specific document for implementing the obligation set up in article 55(7) of Regulation 514/2014 relating to paying particular attention to the monitoring and evaluation of actions and programmes related to third countries.

Therefore, the European Commission does not hold any documents ‘[...] for the purpose of “paying particular attention to the monitoring and evaluation of actions and programmes related to third countries, in accordance with Article 8” – [...] implementing the obligation set up by article 55(7) of the EU Reg. No 514/2014’.

Indeed, as specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. I would like to refer in this respect to the judgment of the Court of Justice in Case C-127/13 P (*Strack v Commission*), according to which ‘[n]either Article 11 of Regulation 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist’.⁴

³ Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management, Official Journal L 150 of 20 May 2014, p. 112.

⁴ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

The above-mentioned conclusion has been confirmed in Case C-491/15 P (*Typke v Commission*), where the Court of Justice held that ‘the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned and [...] Regulation No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist.

It follows that, [...], an application for access that would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation No 1049/2001’.⁵

Furthermore, 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.⁶ This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence.⁷ The Court of Justice, ruling on an appeal in Case C-440/18 P, has recently confirmed these conclusions.⁸

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

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
Ilze JUHANSONE
Acting Secretary-General

Document (explanatory annex): (1)

⁵ Judgment of the Court of Justice of 11 January 2017, *Typke v Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

⁶ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

⁷ *Ibid.*

⁸ Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18 P, EU:T:2018:207, paragraph 14.