



EUROPEAN COMMISSION

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Anne Friel
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**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 2020/450**

Dear Ms Friel,

I refer to your email of 27 March 2020, registered on 30 March 2020, in which you submitted 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.

1. SCOPE OF YOUR APPLICATION

In your initial application of 23 January 2020, you requested access to:

1. Any records, minutes or notes of meetings/discussions that took place between the Commission and the Member State representatives on the TACs for 2020, including any minutes or notes of Council working party/ministerial meetings taken by Commission staff, and any internal Commission briefings on the subject, as well as the Commission’s legislative proposals for the 2020 TACs should they be annotated and/or contain negotiation directives.

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

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

2. A full table of all proposed and agreed quota adjustments (such as those previously referred to as quota top-ups or any deductions) to account for a) catches that could be discarded before the introduction of the landing obligation, but now will have to be landed and b) exemptions from the landing obligation (in tonnes and %), and TACs before the adjustments (top-ups or deductions) were applied;
3. A detailed description of the methodology used to calculate quota adjustments (top-ups or deductions) insofar it differs from the approach taken last year as explained in the documents to which you were given access in the context of your request No Gestdem 2019/768;
4. The calculations that the proposed and agreed quota adjustments (top-ups or deductions) were based on, ideally in Excel spreadsheet format. In particular, any updates drawn up by the Commission after 25 October 2019, as well as the calculations regarding the final adjustments agreed by the Council insofar they differ from the calculations and results presented in WK 11790/2019 ADD 1 of 25/10/2019 and WK 11790/2019 INIT of 25/10/2019;
5. Any documents relating to exemptions from the landing obligation for 2020 in the North Sea, North Western Waters and South Western Waters in the period between the STECF's Expert Working Group 19-08 of June 2019 and the Commission's adoption of the discard plans in October 2019, 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 States regarding this matter.

With regard to category one of your initial application, you clarified that '[you] do not seek access to the [European] Commission's legislative proposals for the 2020 T[otal]A[llowable]C[atch]s, unless such documents are annotated and/or contain negotiation directives. [You] also do not seek access to the documents that are publicly available in the Council's document register, filed under interinstitutional code 2019/0235 (NLE) at the date of [your] request'.

Your initial application was attributed to the Directorate-General for Maritime Affairs and Fisheries for handling and reply. It identified 38 documents as falling under the scope of your application and in the initial reply, provided on 6 March 2020, granted wide partial or full access to the majority of them.

The Directorate-General for Maritime Affairs and Fisheries informed you that it did not hold any documents that would correspond to the description given in your application under categories two and four for the following reasons: as regards category two, it explained to you that the European Commission did not produce any table that matches the features requested in your application and as regards category four, that the European Commission did not produce any updates to the calculations and results presented in WK 11790/2019 ADD 1 of 25/10/2019 and WK 11790/2019 INIT of 25/10/2019.

As regards category three of your application, it confirmed to you that the approach taken in the framework of your current application did not differ from the previous year in the context of your request referenced under number Gestdem 2019/768. Consequently, no documents falling under the scope of category three were identified. I note that you did not challenge this aspect of the initial decision in your confirmatory application.

The Directorate-General for Maritime Affairs and Fisheries granted full or wide partial access to all the identified documents corresponding to categories one and five of your initial application. It further informed you that documents identified under category five relating to the written procedure for the three regulations specifying details of the landing obligation are published and can be accessed directly in the Official Journal ³.

For the documents in categories one and five which were not fully disclosed, the Directorate-General for Maritime Affairs and Fisheries redacted personal data, based on the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

With regard to the identified document corresponding to category one of your application (the report of the Council Ministerial Meeting of 16 and 17 December 2019), the Directorate-General for Maritime Affairs and Fisheries partially refused access thereto. It invoked the exception provided for in Article 4(3), first and second subparagraphs, of Regulation (EC) No 1049/2001 (protection of the decision-making process).

Finally, with regard to the official records of the exchanges between Member States and the European Commission, the Directorate-General for Maritime Affairs and Fisheries explained that such exchanges are always taking place during Council meetings and it informed you that you could address yourself to the Council, which has produced a comprehensive report of the Council proceedings.

On 27 March 2020, you submitted a confirmatory application. In that application, you argue that, in identifying only one document under category one, the Directorate-General for Maritime Affairs and Fisheries has failed to fully disclose Commission records of discussions at the Agriculture and Fisheries Council of 16 and 17 December 2019. Furthermore, you contest the application of the exception provided for in Article 4(3) of Regulation (EC) No 1049/2001 to the redacted parts of the identified document, as the reasons provided do not, in your view, meet the legal standards required by the case law of the Court of Justice of the EU (CJEU) for the application of this exception.

Furthermore, you contest the alleged failure of the Directorate-General for Maritime Affairs and Fisheries to identify any records within its possession of Council working party or COREPER and you argue that such documents have been made available to you in previous years.

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2019:336:TOC>.

Finally, you contest the statement of the Directorate-General for Maritime Affairs and Fisheries, according to which it does not hold any documents corresponding to category two of your initial application ('[a] full table of all proposed and agreed quota adjustments [...]').

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 your confirmatory application, the European Commission has carried out an assessment of the document corresponding to category one of your initial application and a renewed, thorough search for documents falling within the scope of your request.

As regards the document identified under category one at initial stage (the report of the Council Ministerial Meeting of 16 and 17 December 2019), I can inform you that access is now granted to the information in which you are interested. Please take note that this report only reflects the understanding of the author of the positions of the Member States expressed during the negotiations.

As regards the part of your confirmatory application whereby you argue that the initial decision of 6 March 2020 refers to documents in plural issued during the early stages of the negotiation process, I would like to specify that there has been a misunderstanding created by the wording of this paragraph (the use of documents in plural). Therefore, I would like to confirm that the identified document is indeed the only identified document for this meeting of 16 and 17 December 2019.

Furthermore, following the renewed research for documents, the European Commission has identified the following document as falling within the scope of your request, in addition to the documents identified at initial stage:

- COREPER I meeting report of 11 December 2019, reference number SI(2019) 774.

As regards this newly identified document, I can inform you that partial access covering the positions of the Member States is granted to it.

Please note that substantial parts of both documents contain information unrelated to the topic in which you are interested (for example, relating to the issues of the Common Agricultural Policy). This information falls outside the scope of your application and was marked as such.

The assessment was based on a restrictive interpretation of the exceptions of Regulation (EC) No 1049/2001, in accordance with Article 6 of Regulation (EC) No 1367/2006⁴.

Finally, I note that this confirmatory application does not concern the redaction of personal information under Article 4(1)(b) of the Regulation performed at initial stage, as you specifically excluded this from your application.

Regarding the part of your request to obtain documents relating to agreed quota deductions in the form of a full table of all proposed and agreed quota adjustments (category two of your request) I would like to confirm that the European Commission does not hold such a document.

I would also like to confirm that the document which you have received from the Council contains the calculations applied to such deductions and no updates were produced to WK 11790/2019 ADD 1 25/10/2019 after 25 October 2019.

Please note that the discrepancies observed between the European Commission's initial proposal and the final adopted TACs are the result of political negotiations carried out during the Council ministerial meeting.

As regards the part of your application whereby you contest the alleged failure of the Commission to provide access to Commission records of relevant Council preparatory meetings, I would like to underline that this concern has been addressed with the identification and partial disclosure of the COREPER Report in the framework of the present decision.

Furthermore, I would like to confirm that the official records of the Council working parties' meetings are drafted by the services of the Council and not by the Commission's services and are regularly published in the Council's document register⁵. As you specifically excluded from the scope of your request any publicly available documents in the Council's register, the European Commission did not include these documents in its assessment.

In line with Article 2(3) of Regulation (EC) No 1049/2001 '[t]his Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union'. Article 10(3) of the above-mentioned regulation provides that '[d]ocuments shall be supplied in an existing version and format [...]'.

⁴ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Official Journal L 264, of 25.9.2006, p. 13–19.

⁵ <https://www.consilium.europa.eu/en/documents-publications/public-register/>.

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 in Case C-127/13 P, 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'⁶. The above-mentioned conclusion has been confirmed by the Court of Justice in Case C-491/15 P⁷.

In the light of the above, given that the European Commission does not hold any such documents corresponding to the description given in your application as far as categories one (partly) and two of your initial application are concerned, it is not in a position to fulfil your request.

Finally, as regards the particular stocks mentioned at the end of your confirmatory application (SOL/7HJK., SOL/07E., BOR/678-), please note that this is a very specific substance-related question which exceeds the scope of application of Regulation (EC) No 1049/2001. You will therefore receive a separate reply under the Code of Good Administrative Behaviour concerning this point.

3. 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
Ilze Juhansone
Secretary-General



Enclosures: [2]

⁶ Judgment of the Court of Justice of 2 October 2014, Case C-127/13 P, *Strack v Commission*, (EU:C:2014:2250), paragraph 46.

⁷ Judgment of the Court of Justice of 11 January 2017, in Case C-491/15 P, *Typke v Commission*, (EU:C:2017:5), paragraph 31.