



EUROPEAN COMMISSION

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Mr Robert Gorwa
Alexander von Humboldt Institut
für Internet und Gesellschaft
Französische Straße 9
10117 Berlin
Germany

**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 2020/3307**

Dear Mr Gorwa,

I refer to your email of 25 June 2020, registered on the same day, by 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’).

On 20 April 2020, you submitted an initial application for access to documents under Regulation (EC) No 1049/2001 to the European Commission, in which you requested access to:

1. “the comments issued by Italy and Sweden;
2. the draft law assessment on 2017/127/D put together by JUST and CNECT, and shared internally between JUST and CNECT via email on 23 May 2017 [potential reference number: Ares(2017)5237754];
3. any other analysis, commentary or opinions on the notification 2017/127/D from the Legal Service, DG CNECT, DG GROW, DG JUST, or other DGs, including draft reports, memos, or other documents”.

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

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

Your request has been attributed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (GestDem reference 2020/2274), the Directorate-General for Communications Networks, Content and Technology (GestDem reference 2020/3305), the Directorate-General for Justice and Consumers (GestDem reference 2020/3306) and the Legal Service (GestDem reference 2020/3307).

Under the latter request, in its initial reply of 16 June 2020, the Legal Service identified the following document as matching the terms of your request:

“ - email of 30 May 2017 to the attention of DG CNECT and DG JUST with title “DE Notification TRIS/2017/217 –NetzDG” (document reference Ares(2017)4266643)”

The Legal Service informed you that it could not disclose the identified document since it was covered by the exceptions provided for in Article 4(2), second indent (protection of legal advice) and Article 4(3), first subparagraph (protection of the decision-making process), of Regulation (EC) No 1049/2001.

In your confirmatory application regarding the initial reply by the Legal Service, you questioned the absence of any further documents beyond the document that had been identified by the Legal Service, notably “other analysis, commentary or opinions on the notification 2017/127/D from the Legal Service”. You explained that you “would like to receive, as mentioned in my original request, all other documents that contain analysis of the legal ramifications of the 2017 NetzDG notification (including its compatibility with the E-Commerce Directive and the ECHR)”.

Against this background, the European Commission has carried out a renewed, thorough search for documents that would fall within the scope of your application.

Following this renewed search, I confirm that no additional documents have been found that match your request.

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 European 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’³.

The above-mentioned conclusion has been confirmed in Case C-491/15 P (*Typke v European 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.

³ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

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 1049/2001⁴.

Furthermore, the General Court held in Case T-468/16 (*Verein Deutsche Sprache v European Commission*) that there exists a presumption of lawfulness attached to the declaration by the institution asserting that documents do not exist⁵. This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence⁶. You did not put forward such evidence in your confirmatory application. The Court of Justice, ruling on an appeal in Case C-440/18 P, has confirmed the earlier conclusions by the General Court⁷.

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
Secretary-General

⁴ Judgment of the Court of Justice of 11 January 2017, *Typke v European Commission*, [C-491/15 P](#), EU:C:2017:5, paragraph 31.

⁵ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v European Commission*, [T-468/16](#), EU:T:2018:207, paragraphs 35-36.

⁶ *Ibid.*

⁷ Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18P, ECLI:EU:C:2019:77, paragraph 14.