



EUROPEAN COMMISSION

Brussels, 4.2.2019
C(2019) 916 final

OUT OF SCOPE

United Kingdom

**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 2018/5001**

Dear ,

I refer to your e-mail of 9 November 2018, registered on 12 November 2018, 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').

1. SCOPE OF YOUR REQUEST

In your initial application of 10 September 2018, addressed to the Directorate-General for Justice and Consumers, you requested access to the reply of the Italian authorities of 18 July 2016 to the European Commission's note of 29 April 2016 in the framework of the EU Pilot procedure 8525/16/JUST.

The European Commission has identified the following document as falling under the scope of your request:

- Letter of 6 June 2016 from the Italian Ministry of Justice replying to an information request by the European Commission regarding EU Pilot procedure 8525/16/JUST, reference Ares(2018)5706470.

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

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

In its initial reply of 8 November 2018, the Directorate-General for Justice and Consumers informed you that it had consulted the Italian authorities, from whom the document originated, in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001. The Italian authorities objected to the disclosure of the requested document based on Article 4(2), third indent (protection of the purpose of the investigations) of Regulation (EC) No 1049/2001. Taking into account the reply from the Italian authorities, the Directorate-General for Justice and Consumers granted partial access to the document. The limited redactions were based on Article 4(2), third indent (protection of the purpose of the investigations) of Regulation (EC) No 1049/2001.

In your confirmatory application, you requested a review of this position. You put forward that the ‘investigation is surely now completed’.

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 relevant Directorate-General at the initial stage.

According to Article 4(4) of Regulation (EC) No 1049/2001, ‘[a]s regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.’ According to Article 4(5) of Regulation (EC) No 1049/2001, ‘[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.’

In order to give the Italian authorities the possibility to re-consider their position in the light of the arguments presented in your confirmatory application, the Secretariat-General re-consulted the Italian authorities, from whom the document originates, in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001.

It explained that the EU Pilot procedure registered under reference number EU Pilot 8525/16/JUST (hereafter ‘EU Pilot procedure 8525/16/JUST’) was initiated as a follow-up to two individual complaints by citizens. While one of the complaints was closed on 21 December 2017, the other complaint is still under examination. Therefore, the EU Pilot procedure 8525/16/JUST is still ongoing. The Secretariat-General explained that the Directorate-General for Justice and Consumers had disclosed only parts of the requested document, which referred to the complaint, which was closed on 21 December 2017, and requested the opinion of the Italian authorities on possible further disclosure of the document.

In response to this consultation, the Italian authorities explained that the requested document contains legal explanations, which are relevant for ongoing EU Pilot procedure 8525/16/JUST. They concluded that no further access should be granted as long as the decision-making process is still ongoing. Consequently, the Italian authorities objected to further disclosure, based on Article 4(2), third indent (protection of the purpose of the investigations) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

The European Commission has carried out an assessment of the arguments put forward by the Italian authorities, based on Article 4(4) and (5) of Regulation (EC) No 1049/2001.

In Case T-74/16 (*Pagkyrios Organismos Ageladotrofon*), the General Court clarified that ‘before refusing access to a document originating from a Member State, the institution concerned must examine whether that Member State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation (EC) No 1049/2001 and has given proper reasons for its position. Consequently, when taking a decision to refuse access, the institution must make sure that those reasons exist and refer to them in the decision it makes at the end of the procedure’.³

The General Court clarified in this judgment that the institution ‘must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document applied for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access provided for in Article 4(1) to (3) of the regulation applies’⁴.

The General Court also clarified that ‘the institution to which a request for access to a document has been made does not have to carry out an exhaustive assessment of the Member State’s decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation (EC) No 1049/2001.[...] The institution must, however, check whether the explanations given by the Member State appear to it, *prima facie*, to be well founded’⁵.

Following this assessment, I have come to the conclusion that the Italian authorities based their objections to the disclosure of the requested document on Article 4(2), third indent (protection of the purpose of the investigations) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001 and have given proper reasons for their position. These arguments justify at first sight the application of these exceptions.

Therefore, I wish to inform you that no further access is granted to the requested document, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual), Article 4(2), third indent (protection of the purpose of the investigations) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘access to a document is refused 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’.

³ Judgment of 8 February 2018 in Case T-74/16, *Pagkyrios Organismos Ageladotrofon v Commission* EU:T:2018:75, paragraph 55.

⁴ Ibid, paragraph 56.

⁵ Ibid, paragraph 57.

In Case C-28/08 P (*Bavarian Lager*),⁶ the Court of Justice ruled that when a request is made for access to documents containing personal data, 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 data⁷ ('Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁸ (hereafter 'Regulation (EU) 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation'⁹.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.¹⁰

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), 'there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life'.¹⁰

The requested document include the names and contact details of natural persons, their signatures or their contact details.

This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if '[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is

⁶ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

⁷ Official Journal L 8 of 12.1.2001, page 1.

⁸ Official Journal L 205 of 21.11.2018, p. 39.

⁹ *Bavarian Lager*, cited above, paragraph 59.

¹⁰ Judgment of 20 May 2003 in Joined Cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, EU:C:2003:294, paragraph 73.

proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine on its own motion the existence of a need for transferring personal data.¹¹ This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not refer in any way to the personal data included in the requested document, nor do you put forward any arguments to establish the necessity to have the personal data included in the document transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

As to the handwritten signatures appearing in the requested studies, which constitute biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

¹¹ Judgment of 16 July 2015 in Case C-615/13 P, *ClientEarth v European Food Safety Agency*, EU:C:2015:489, paragraph 47.

2.2. Protection of the purpose of investigations and of the decision-making process

Article 4(2), third indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits.'

Article 4(3), first subparagraph of Regulation (EC) No 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'.

Without prejudice to the question of whether an overriding public interest in releasing the documents can be identified (which is the subject of point 3 below), I would like to underline that the investigative activities in EU Pilot procedure 8525/16/JUST, in the context of which the requested document was sent to the European Commission, are still ongoing and could lead to the opening of infringement proceedings under Article 258 Treaty on the Functioning of the European Union.

Under these circumstances, there is a real and non-hypothetical risk that the early disclosure of the document pertaining to the administrative file of an ongoing case would adversely affect the ongoing investigation and its follow-up. In order for the European Commission to be able to carry out its tasks, there has to be a protected space throughout the different stages of the procedures until the case has been definitively closed. For this reason, the European Commission must refuse access to the withheld parts of the document, which are relevant for the ongoing EU Pilot procedure based on the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

In Case T-306/12 (*Spirlea*), the General Court recognised the importance of 'an atmosphere of mutual trust between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to an amicable settlement of the dispute, without it being necessary to initiate an infringement procedure under Article 258 TFEU, which would be likely to lead to the dispute being brought before the Court'¹².

Further public disclosure of the requested document, against the expressed opposition of the Italian authorities, while the EU Pilot procedure is still ongoing, would, indeed jeopardise the atmosphere of mutual trust between the European Commission and the Italian authorities and the chances of an amicable settlement of the dispute. In this sense, further public disclosure would also jeopardise the decision-making process of the European Commission.

¹² Judgment of 25 September 2014 in Case T-306/12 *Darius Nicolai and Mihaela Spirlea v Commission*, EU:T:2014:816, paragraph 57, confirmed by the Judgment of 11 May 2017 in Case C-562/14 P, *Kingdom of Sweden v European Commission*, EU:C:2017:356.

I conclude, therefore, that further access to the requested document must be denied based on the exception laid down in the third indent of Article 4(2) and in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, namely it must in this case outweigh the interest protected by virtue of the third indent of Article 4(2) and of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

In your confirmatory application, you did not invoke any overriding public interest that would warrant the public disclosure of the document concerned. Consequently, I carried out my own assessment as regards the possible existence of such public interest.

Following that assessment, I have not been able to identify any elements capable of demonstrating the existence of any possible overriding public interest in disclosing the refused elements that would outweigh the interests protected by the third indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

To the contrary, I consider that in this specific case, the public interest is better served by protecting the purpose of the ongoing investigation and the decision-making process with the aim to reach conformity with EU law of the legal framework in the Member State concerned, as this constitutes the ultimate purpose of the European Commission's investigations.

4. MEANS OF REDRESS

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,

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Secretary-General