



EUROPEAN COMMISSION

Brussels, 4.3.2019
C(2019) 1870 final

[REDACTED]
Czech Republic

**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 2018/6849**

Dear [REDACTED]

I refer to your letter of 24 January 2019, registered on 25 January 2019, 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 19 December 2018, addressed to the Directorate-General for Budget, you requested access to 'the document defining the scope and methodology of [the] audit which is to be performed by the European Commission in the Czech Republic in respect of conflict of interest as announced by Commissioner Oettinger in the plenary session of the European Parliament on 12 December 2018'.

The European Commission has identified documents pertaining to the following audit file as falling within the scope of your request:

- 'Audit missions No REGC414CZ0133 and audit enquiry (AGRI) UMB/2019/003/CZ'.

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 23 January 2019, Directorate-General for Budget refused access to one document concerning the above-referred file, based on the exception of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In your confirmatory application, you requested a review of this position. You support your request with detailed arguments, which I address in the corresponding sections below.

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 review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I wish to inform you that I confirm the initial decision of the Directorate-General for Budget to refuse access, based on the exceptions of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits), Article 4(1)(a), fourth indent (protection of the public interest as regards the financial policy of the European Union), and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the purpose of inspections, investigations and audits

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, [...] unless there is an overriding public interest in disclosure.’

The documents requested are letters sent by the European Commission to the Czech authorities as part of the administrative file of a co-ordinated audit in relation to certain operational and rural development plans in the Czech Republic. The documents requested contain the scope and methodology of the audit and describe in detail the audit operations to be carried out on the spot.

The main objective of the co-ordinated audit is to verify the appropriateness of the management and control mechanisms implemented by the Czech Republic to avoid a conflict of interests. The audit covers the management and control systems in place before the entry into force of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (hereafter ‘Regulation (EU, Euratom) 2018/1046’)³. It also covers operations approved after the entry into force of Regulation (EU, Euratom) 2018/1046.

³ Official Journal L 193 of 30.7.2018, p. 1.

Pursuant to Article 75(2) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (hereafter ‘Regulation (EU) No 1303/2013’)⁴, ‘Commission officials or authorised Commission representatives may carry out on-the-spot audits or checks [...]. The scope of such audits or checks may include, in particular, verification of the effective functioning of management and control systems in a programme or a part thereof, in operations and assessment of the sound financial management of operations or programmes’.

As a follow-up to those (on the spot) audits or checks, the European Commission may, based on Article 75(3) of Regulation (EU) No 1303/2013, ‘require a Member State to take the actions necessary to ensure the effective functioning of their management and control systems or the correctness of expenditure in accordance with the Fund-specific rules’.

It follows from the above that the co-ordinated audit and its follow-up, envisaged by the above-mentioned rules, are audits in the sense of Article 4(2), third indent of Regulation (EC) No 1049/2001.

In this regard, I would like to refer to the judgment of the General Court in Case T-480/11 (*Technion*)⁵, in which the General Court considered that the exception of Article 4(2), third indent of Regulation (EC) No 1049/2001 applies if the disclosure of the documents under the request may endanger the completion of inspections, investigations or audits. The General Court stated that ‘[t]he interest protected by that exception is the interest in allowing audits to be conducted independently and free of pressures, whether these come from the body being audited, from other interested bodies or from the general public’.⁶

In the above-referred judgment, the General Court also held that there is a general presumption that documents forming part of the administrative file of an audit can be considered as manifestly covered, in their entirety, by the exception referred to in Article 4(2), third indent of Regulation (EC) No 1049/2001, at least as long as the audit procedure is ongoing.⁷ Indeed, according to the settled case-law, the institutions may base their decisions on general presumptions that apply to certain categories of

⁴ Official Journal L 347 of 20.12.2013, p. 320.

⁵ Judgment of the General Court of 12 May 2015, *Technion v European Commission*, T-480/11, EU:T:2015:272.

⁶ *Ibid*, paragraph 63.

⁷ *Ibid*, paragraphs 55-65.

documents, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature.⁸

In light of the above case law, I consider that the documents identified as falling within the scope of your request are manifestly covered, in their entirety, by the exception referred to in Article 4(2), third indent of Regulation (EC) No 1049/2001, as they form part of the administrative file of the above-mentioned co-ordinated audit. Public access to these documents, which have been sent to the Czech authorities as part of the audit procedure, would be detrimental to the proper conduct of the audit in question. It would compromise the smooth cooperation between the European Commission and the Czech authorities, which is an essential precondition for the effective fulfilment of the duties of the European Commission. Indeed, it would lead to reduced willingness by the authorities of the Member State concerned to participate constructively in ongoing and future audits concerning Union funds.

Moreover, I would like to draw your attention to the fact that the co-ordinated audit is still in progress. Indeed, the relevant European Commission services carried out on the spot audit missions in the Czech Republic from 8 January to 15 February 2019. On the basis of the information gathered during these initial audits, the European Commission will inform the Czech authorities if there is a need to obtain additional information or conduct additional on the spot audit missions.

Given the ongoing nature of the co-ordinated audit, the disclosure of the documents requested would expose the relevant European Commission departments to the foreseeable risk of coming under outside pressure, which would be detrimental to the proper conduct of the co-ordinated audit and undermine its effectiveness. It could also affect the European Commission's capacity to carry out appropriate follow-up measures, if deemed necessary. I take the view that the purpose of such audits in the Member State concerned is best achieved free from external pressure, notably when the subject of the inspections concerns the sensitive topic of potential shortcomings in the mechanisms for the prevention of conflict of interests in the allocation of European Union funds.

Against this background, there is a foreseeable and not purely hypothetical risk that the public release of the requested documents would undermine the purpose of an ongoing audit, which is, in this instance, to ensure that the management and control systems implemented by the Member State are functioning effectively and, ultimately, to protect the Union's financial interests.

⁸ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau* (hereafter referred to as '*Commission v TGI* judgment'), C-139/07 P, EU:C:2010:376, paragraph 54; Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v European Commission*, Joint Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 45.

Please note that it is not possible to give more detailed descriptions justifying the need for confidentiality in respect of each document under the request without disclosing their content and, thereby, depriving the exception of its very purpose.⁹

I conclude, therefore, that the requested documents are covered in their entirety by the exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 and that access must be denied on this basis.

2.2. Protection of the public interest as regards the financial policy of the European Union

Article 4(1)(a), fourth 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 public interest as regards [...] the financial, monetary and economic policy of the Community or a Member State’.

In its judgment in Case T-264/04 (*WWF*)¹⁰, the Court of First Instance (now General Court) considered that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, that the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’.¹¹

The financial policy of the European Union relates closely to the proper management of Union funds. Indeed, the inadequate implementation of the European Structural and Investment Funds, or any irregularity in their management, would have the effect of prejudicing the budget of the European Union and, therefore, its financial interests.

The above-mentioned audits are one of the means to protect the financial interests of the European Union. Should the European Commission services detect a serious dysfunction in the Czech management and control systems or serious irregularities in the financial management of the programmes and operations concerned, the European Commission may apply the necessary measures to ensure the proper use of the Union funds and protect the financial interests of the European Union.

Public access to the requested documents, which would undermine the purpose of the ongoing audit, would also undermine the financial interests of the European Union, as it would hamper the European Commission’s ability to address constructively possible shortcomings in the mechanisms in place to prevent conflict of interests in the Member State and apply appropriate corrective measures, where necessary.

⁹ To that effect, see Judgment of the General Court of 24 May 2011, *Navigazione Libera del Golfo Srl v European Commission*, Joint Cases T-109/05 and T-444/05, EU:T:2011:235, paragraph 82; Judgment of the General Court of 8 February 2018, *Pagkyprios organismos ageladotrofon v European Commission*, T-74/16, EU:T:2018:75, paragraph 71.

¹⁰ Judgment of the Court of First Instance of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114.

¹¹ *Ibid*, paragraph 40.

In light of the above, there is a real and non-hypothetical risk that such premature disclosure would undermine the protection of the public interest as regards the financial policy of the European Union, notably with regard to the proper management of European Union funds.

Consequently, I consider that the public disclosure of the requested documents is also prevented on the grounds of the protection of the public interest as regards the financial policy of the European Union, based on the exception of Article 4(1)(a), fourth indent of Regulation (EC) No 1049/2001.

2.3. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘[t]he 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’.

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹², 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 data¹³ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.¹⁴

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been replaced 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/EC¹⁵ (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’.¹⁶

¹² Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378.

¹³ Official Journal L 8 of 12.1.2001, p. 1.

¹⁴ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

¹⁵ Official Journal L 205 of 21.11.2018, p. 39.

¹⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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

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’.¹⁷

The requested documents contain personal data such as the names and surnames of persons who do not form part of the senior management of the European Commission. They also contain personal data from third parties, including the names of representatives of the Czech authorities. The names¹⁸ of the persons concerned as well as other data from which their identity can be deduced clearly constitute personal data in the meaning 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 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 by itself the existence of a need for transferring personal data.¹⁹ 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 the 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 put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

¹⁷ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joint Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁸ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹⁹ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' 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 requested 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.

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 the disclosure of the personal data concerned.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

According to the case law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal.²⁰

In your confirmatory application, you claim that there is a 'clear overriding public interest in disclosure of [the requested documents]' and you put forward several arguments, which can be summarised as follows:

- Firstly, you argue that the 'the issue of conflict of interests of the Czech Prime Minister' has attracted considerable attention from the media (both at a national and international level). Moreover, 'the issue was discussed in the plenary session of the European Council on 12 December 2018'.
- Secondly, you refer to Article 319(3) of the Treaty on the Functioning of the European Union, which provides that 'the Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council'.

²⁰ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

- Thirdly, you refer to the European Parliament’s resolution on 13 December 2018, in which the European Parliament requested the European Commission to ‘publish all documents at its disposal related to the possible conflict of interests of the Czech Prime Minister and Minister of Agriculture, and explain what steps it intends to take to remedy the situation’.²¹
- Fourthly, you indicate that the Chair of the European Parliament’s Committee on Budgetary Control stated on 9 January 2019 that the European Commission is obliged to comply with the observations made by the European Parliament in the aforementioned resolution. You also refer to Commissioner Oettinger’s speech on 22 January 2018 in the European Parliament’s Committee on Budgetary Control.
- Finally, you point out that, ‘on 21 January 2019, the Czech municipal authority in Černošice ruled that Prime Minister Andrej Babiš has a conflict of interest around his media organisations that are controlled by the Agrofert group [...]’.

Having carefully analysed the above-referred arguments, I agree that, from a general point of view, they point to the existence of a certain interest in the subject matter at hand. However, I consider that such considerations do not demonstrate any pressing need for the public to obtain access, in particular, to the documents forming part of the audit file. Moreover, I do not see how this interest would override the public interest in ensuring that the ongoing audits are properly conducted, and that the control systems in the Member State concerned are fully aligned with the required Union standards.

Furthermore, I would like to stress that the requested documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness²². The General Court confirmed this jurisprudence in its judgment in Case T-476/12 (*St. Gobain Glass*)²³ stressing the serenity of administrative proceedings and the need to protect administrative procedures from external pressure.

In light of the above, I must conclude that the arguments you invoke do not demonstrate how the disclosure of the requested documents would contribute, in a concrete manner, to the protection of any public interest that would override the public interest protected by Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

Please note also that the requested documents are also protected under Articles 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001, which do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

²¹ European Parliament resolution of 13 December 2018 on conflicts of interest and the protection of the EU budget in the Czech Republic (2018/2975(RSP), point 13.

²² *Commission v TGI* judgment, cited above, paragraphs 53-55 and 60; *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

²³ Judgment of the General Court of 11 December 2014, *Saint-Gobain Glass Deutschland v European Commission*, T-476/12, EU:T:2014:1059, paragraphs 81-82.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

However, as stated by the Court of Justice, where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full, or in part.²⁴

Consequently, as explained in sections 2.1 and 2.2 above, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

5. 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,



For the Commission
Martin SELMAYR
Secretary-General

²⁴ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.