



EUROPEAN COMMISSION

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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 2018/6541**

Dear ██████████,

I refer to your email of 8 January 2019, registered on 9 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'). Please accept our apologies for the delay in replying.

In your initial application of 29 November 2018, you submitted a request for access to the following documents: '[c]lear EU documents that MSC 139(76) ANNEX 2 Mandatory Ship Reporting System in Adriatic Sea i[s] replaced with SafeSeaNet (EMSA)'. You further specified that you wanted to know when this change, if any, was made and you requested access to the '[n]otification to the IMO-MSA about that change'.

Your request was handled by the Directorate-General for Mobility and Transport, as only the latter was concerned by it.³

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

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

³ Initially, your request was split between the Directorate-General for Communications Networks, Content and Technology (referenced under number GESTDEM 2018/6539), the Directorate-General for Mobility and Transport (referenced under number GESTDEM 2018/6541) and the Directorate-General for Maritime Affairs and Fisheries (referenced under number GESTDEM 2018/6542).

By letter of 7 January 2019, the Directorate-General for Mobility and Transport informed you that it does not hold any documents falling within the scope of your request.

In your confirmatory application, you questioned the absence of any documents.

Please note that this confirmatory decision only addresses the questions on the right of access to documents under Regulation (EC) No 1049/2001. All other issues raised in your application, which do not relate to the right of access to documents, cannot be addressed in the context of this decision.

Against this background, 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.

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

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

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

⁵ Judgment of the Court of Justice of 11 January 2017, *Typke v Commission*, Case 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*, Case 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*, Case C-440/18 P, EU:C:2019:77, paragraph 14.

In your application, you request access to '[c]lear EU documents that MSC 139(76) ANNEX 2 Mandatory Ship Reporting System in Adriatic Sea i[s] replaced with SafeSeaNet (EMSA)'. Please note in this regard that the SafeSeaNet, a network for maritime data exchange, linking together maritime authorities from across Europe, does not replace any mandatory ship reporting system. EU Member States notify mandatory ship reporting systems to the International Maritime Organisation ('IMO'). Such mandatory ship reporting systems may subsequently be connected to the SafeSeaNet system, but are not replaced by it. Therefore, the European Commission does not hold any EU documents regarding the replacement of the mandatory ship reporting system by SafeSeaNet in the Adriatic Sea.

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
Martin SELMAYR
Secretary-General