



EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP  
AND SMES

The Director-General

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**Subject: Request for access to documents -ref. GestDem 2020/4217**

Dear Mr Teffer,

We refer to your e-mail dated 10/07/2020 in which you make a request for access to documents, registered on 10/07/2020 under the above mentioned reference number.

You request access to:

*“The content of all member states' notifications of the provisions on penalties, as required by article 45 of Regulation (EU) 2016/425 of 9 March 2016 on personal protective equipment, received by the European Commission since 21 March 2018 until today.”*

DG GROW has identified 80 documents in its possession which fall within the scope of the request. Considering that the requested documents are third party documents (notifications provided by the Member States to the European Commission), the services of DG GROW have consulted the concerned Member States. None of the Member States consulted have objected to the disclosure of their respective notifications.

I regret to inform you that access cannot be granted to 4 of the 80 identified documents, as the said documents relate to an ongoing investigation regarding a possible infringement of EU law (infringement procedure NIF 2018/2412). Pursuant to Article 4(2) third indent of Regulation (EC) 1049/2001 provides that *“The 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.”*

As the law stands, the Court of Justice of the EU has recognised that certain types of documents enjoy a general presumption of confidentiality<sup>1</sup>, in particular the documents concerning an infringement procedure during its pre-litigation stage<sup>2</sup>. Notably, the Court confirmed that it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation (EC) 1049/2001.

Therefore, the documents related to the infringement procedure NIF 2018/2412 are protected by the exception established in Article 4(2) third indent of Regulation (EC) 1049/2001, as interpreted by the Court, and cannot be disclosed unless there is an overriding public interest in their disclosure.

The aim of the exception established in Article 4(2) third indent of Regulation (EC) 1049/2001 is the preservation of the objective of amicable resolution of the dispute between the Commission and the Member State. In the matter of investigations of alleged infringements, sincere cooperation and a climate of mutual confidence between the Commission and the Member States concerned are required to allow both parties to engage in a process of negotiation and compromise with the search for a settlement of a dispute without bringing it before the Court of Justice. Thus, the disclosure of the said documents at this point in time would affect the climate of mutual trust between the authorities of the Member State and the Commission, which is required to enable them to resolve the case.

Having regard to the above, I consider that the use of the exception set forth in Article 4(3), third indent for the protection of the purpose of investigations is justified for the 4 documents related to ongoing investigation procedure NIF 2018/2412 and their disclosure must be refused on that basis.

The possibility of granting partial access to the documents mentioned under this section, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, has also been examined. However, taking into consideration the information available, this has not been considered to be possible since the documents in question are entirely covered by the exception under Article 4(2) of Regulation (EC) No 1049/2001<sup>3</sup>.

According to Regulation (EC) No 1049/2001, the exception laid down in Article 4(2) of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents concerned, which has to outweigh the interest protected by the exception to the right of access. However, in the present case, the services of the Commission have reached the conclusion that there appears to be no overriding public interest in their disclosure in the sense of the Regulation.

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<sup>1</sup> Judgment in case *ClientEarth v Commission*, C-612/13 P, point 77.

<sup>2</sup> Judgment in case *LPN and Finland v Commission*, C 514/11 P and C 605/11 P, point 65.

<sup>3</sup> Judgment in case *ClientEarth v Commission*, T-111/11, point 75 and judgement in case *LPN v Commission*, T-29/08, point 127.

We enclose a copy of all the disclosed documents, the details of which are listed in the attached document register, relating to the above subject matter.

Please note that documents originating from third parties, as defined in Article 3(b) of Regulation (EC) 1049/2001, are disclosed for information only. They do not reflect the position of the Commission and cannot be quoted as such.

With respect to the documents originating from the Commission, i.e. notes, and emails, please note that these documents do not reflect the final position of the Commission. They cannot be quoted as reflecting the Commission's final position and cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.

Additionally, a number of the above documents contain personal data: names, e-mail addresses, phone numbers and addresses.

Pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data. The applicable legislation in this field is 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.<sup>4</sup>

When access is requested to documents containing personal data, Regulation (EU) 2018/1725 becomes fully applicable.

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

As to the handwritten signatures and other handwritten text, which are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing a version of the documents requested in which these personal data have been redacted.

Finally, please note that in accordance with Article 7(2) of Regulation (EC) 1049/2001, you are entitled to make a confirmatory request to the Secretary-General of the Commission within fifteen working days of receiving this letter.

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<sup>4</sup> 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/EC; *OJ L 295, 21.11.2018, p. 39–98*

All correspondence should be sent either electronically to [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu) or by regular mail to the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/288  
B-1049 Bruxelles

Yours faithfully,

Kerstin Jorna

Enclosure:

- Document registry listing the 80 documents falling within the scope of the request GESTDEM 2020/4217
- Archive file „GESTEM 2020-4217\_documents.7z“ containing copies of the 76 disclosed documents (letters, e-mails, notes)