EUROPEAN COMMISSION

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Centre for European Integration
Freie Universität Berlin
Ihnestr. 22
14195 Berlin

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2019/4580

Dear [Name],

I refer to your email of 5 November 2019, registered on the same date, 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 documents (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST


In your initial application you point out that, I quote, ‘[the documents requested] form part of the documents gave to the H[istorical] A[rchives of the] EU in

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3 COREPER.
Florence’ and that, I quote, ‘[you] got permission by him to access the documents but those reports were labelled confidential and need to be declassified’.

Your initial applications was attributed to the Directorate-General for International Cooperation and Development for handling and reply. It identified the following documents as falling under the scope of your initial application:

- Minutes of the Committee of Permanent Representatives meeting on 29 April 1998
- Minutes of the Committee of Permanent Representatives meeting on 14 and 15 May 1998
- Minutes of the Committee of Permanent Representatives meeting on 17 June 1998
- Minutes of the Committee of Permanent Representatives meeting on 24 June 1998.

The Directorate-General for International Cooperation and Development replied to your application on 28 October 2019 and granted partial access to the above-mentioned documents. The undisclosed parts contain personal data which were redacted based on the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

In addition, the Directorate-General for International Cooperation and Development redacted also the names of the Member States and third countries. The underlying exception is provided for in Article 4(1)(a), third indent, of the said regulation and protects international relations.

With regard to the confidential status of the documents concerned, which was the reason why Historical Archives of the EU could not make them available to you, please note that in order to grant (partial) access thereto in its initial reply, the Directorate-General for International Cooperation and Development indeed declassified the documents.

Through your confirmatory application, you request a review of this position.

### 2. Assessment and Conclusions Under Regulation 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 Directorate-General or service concerned at the initial stage.

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4 All five documents bear the same reference number.
Following this review, I have to confirm the position of the Directorate-General for International Cooperation and Development refusing access to the undisclosed parts of documents 1-5. This refusal is based on the above-mentioned exceptions provided for in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 and 4(1)(b) of that regulation.

The detailed reasons are set out below.

As a preliminary comment, I would like to underline that documents released under Regulation (EC) No 1049/2001 become, legally speaking, public documents. Therefore, the identity of the Member States and third countries (redacted at the initial stage by the Directorate-General for International Cooperation and Development) included in the documents concerned, following their public disclosure under Regulation (EC) No 1049/2001, would become widely accessible to the public. In this context, I regret to inform you that it is not possible, under the provisions of Regulation (EC) No 1049/2001, to grant privileged access to the information contained in the requested documents or to enter into “non-disclosure” agreements.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘the 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’.

I note that in your confirmatory application, you do not contest the applicability of the exception quoted above to (the parts of) the documents withheld at the initial stage on this basis. I would like therefore to refer to the argumentation employed by the Directorate-General for International Cooperation and Development in its initial reply.

In its judgment in Case C-28/08 P (Bavarian Lager), 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 data (hereafter ‘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 the above-mentioned 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.

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 2018/1725.
Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person […]’.

Documents 1-5 contain the names and contact details of staff members of the European Commission who do not hold any senior management position.

This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) No 2018/1725 and in the sense of the Bavarian Lager judgment.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, can the transmission of personal data occur.

Furthermore, 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. 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 this context, I would like to point out that the right to the protection of the privacy is recognised as one of the fundamental rights in the Charter of Fundamental Rights, as is the transparency of the processes within the Institutions of the EU. The legislator has not given any of these two rights primacy over each other, as confirmed by the Bavarian Lager case-law referred to above.

In your 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. 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, I note that there is a risk that the disclosure of the names of the individuals appearing in the requested document would prejudice the legitimate interests of the third-parties concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9(1)(b) of Regulation (EU) 2018/1725, 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.

2.2. Protection of international relations

Article 4(1)(a), 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 public interest as regards […] international relations […]’.

I note that with regard to this exception, you also do not contest its applicability to the relevant parts of the documents withheld on its basis. In fact, in your confirmatory application, you underline that, I quote, ‘[you] do well understand the potential harmfulness [of the disclosure of the relevant redacted parts of the documents]’.

Consequently, I have to refer to the argumentation and reasoning employed by the Directorate-General for International Cooperation and Development in its initial reply.

As explained by that Directorate-General, in the sphere of the protection of international relations, the EU Court has acknowledged that the institutions enjoy a wide discretion when considering whether access to a document may undermine that public interest.

The documents 1-5 contain the information regarding the positions and views of the Member States and third countries expressed by the negotiating parties during the post-Lomé negotiations. The Directorate-General for International Cooperation and Development anonymised these positions and views by redacting the names of the Member States and the third countries from the documents.

Disclosure of the documents without these names redacted would reveal to the public at large these positions. The positions and views, as reflected in the documents concerned, evolved in time and had been subsequently superseded by the conclusions of the Cotonou Partnership Agreement. The public disclosure of the non-anonymised positions and views included in the documents 1-5, would be negatively received and construed by the third countries involved in the negotiations. That in turn, as explained by the Directorate-General for International Cooperation and Development in its initial reply, would harm

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the relations between the EU and the African Caribbean and Pacific countries, as well as the EU Member States and these countries, through undermining the mutual trust and creating tensions in the partnership.

In the light of the above, I conclude that, there is a reasonable and concrete risk that public disclosure of the relevant undisclosed parts of the documents concerned is likely to harm the interest protected by Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

3. **NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

In your confirmatory application, you explain that you need the information included in the withheld parts of the documents, I quote, ‘[…] for the purpose of research within [your] dissertation’. You also underline that, I quote, ‘[you] would be ready to sign a non-disclosure agreement and not cite the information in [your] dissertation openly […]’.

Please note, however, that the personal motivations of the applicants may not be taken into account in the assessment carried out under Regulation (EC) No 1049/2001, because, as explained above, the documents released under that regulation become, legally speaking, available to the public at large. For the same reason, it is not possible to provide you the unredacted versions of the documents on a ‘privileged’ basis (even with a “non-disclosure agreement”).

In addition, the exceptions in Article 4(1)(a) and Article 4(1)(b) of Regulation (EC) No 1049/2001 do not need to be balanced against overriding public interest in disclosure.

4. **PARTIAL ACCESS**

Wide partial access is hereby granted to the documents concerned. No further partial access is possible, having regard to the need to protect some parts of the documents at issue, by virtue of the exceptions referred to in section 2 of this decision.
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,

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**CERTIFIED COPY**
For the Secretary-General,

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**For the Commission**

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