EUROPEAN COMMISSION

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DK-0999 Copenhagen N
Denmark

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 2019/2947

Dear ,

I refer to your letter of 3 July 2019, registered on the same day, in which you submit 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’).

I apologise for the delay in the handling of your application.

1. SCOPE OF YOUR REQUEST

In your initial application of 21 May 2019, registered under reference GESTDEM 2019/2947 and addressed to the Service for Foreign Policy Instruments, you requested access to, I quote: ‘all documents, notes on e.g. phone calls, memos, correspondence, etc. (related to Council Reg 1323/2014) which have been added since my first request on Oct 24, 2018, or which were not included in your first reply to me’.

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

– E-mail exchanges between the Service for Foreign Policy Instruments and the Permanent Representation of Cyprus to the European Union, 6

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– e-mail exchanges between the Service for Foreign Policy Instruments and the Permanent Representation of Greece to the European Union, 6 November 2018 – 5 December 2018, reference Ares(2019)4287247 (hereafter ‘document 2’);

– e-mail exchanges between the Service for Foreign Policy Instruments and the Permanent Representation of Denmark to the European Union, 11 June 2019, reference Ares(2019)4287247 (hereafter ‘document 3’).

In its initial reply of 18 June 2019, the Service for Foreign Policy Instruments refused access to these documents based on the exception of Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position and you put forward a series of arguments in support of your request. These have been taken into account in my assessment, set out in the corresponding sections below.

In addition to documents 1-3, the European Commission has identified one more document under your request:

– e-mail sent by the Permanent Representation of Greece to the European Union to the Service for Foreign Policy Instruments, 26 July 2019, reference Ares(2019)6106484 (hereafter ‘document 4’).

In your letter, you also contest the reply of the Service for Foreign Policy Instruments, dated 13 November 2018, in the context of a previous request for access to documents which you submitted on 24 October 2018 (reference GESTDEM 2018/5583). In particular, you challenge the absence of any documents under that request.

As regards your arguments relating to the possible existence of additional documents falling under that application, I would like to draw your attention to the conditions for the review of the position adopted by the Service for Foreign Policy Instruments, which were set out in its initial decision of 13 November 2018. In this respect, I note that you did not contest the reply you received within the time limit provided for under Regulation (EC) No 1049/2001.

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 Directorate-General concerned at the initial stage.

Following this review, I can inform you that:
- partial access is granted to documents 2-4, subject only to the redaction of personal data on the basis of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;

- partial access is granted to document 1. The withheld parts of this document are redacted based on the exceptions provided for under Article 4(1)(a), third indent (protection of the public interest as regards international relations) and Article 4(1)(b) of Regulation (EC) No 1049/2001.

The reasons underpinning my assessment are set out below.

2.1. Consultation of the authorities of the Member States

Documents 1-4 are e-mail exchanges between the European Commission and Member States regarding allegations against private operators on possible breaches of the sanctions regime laid down in Council Regulation (EU) No 1323/2014 of 12 December 2014 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (hereafter ‘Regulation (EU) No 1323/2014’). More specifically, the e-mails concern the implementation of the restrictive measures and relate to investigations conducted by competent authorities at a national level against private operators, which concerned identified third countries.

Indeed, according to Article 33(1) of Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (hereafter ‘Regulation (EU) No 36/2012’) 4, ‘Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive’.

Under the provision of Article 4(4) and 4(5) of Regulation (EC) No 1049/2001, the Secretariat-General of the European Commission consulted the authorities of the Member States concerned at the confirmatory stage. The authorities of Greece and Denmark agreed with the partial release of documents 2-4 based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. The authorities of Cyprus agreed with the partial disclosure of document 1 based on Article 4(1)(a), third indent (protection of the public interest as regards international relations) and Article 4(1)(b) of Regulation (EC) No 1049/2001.

In their reply to the above-referred consultation, the authorities of Cyprus argued that a full disclosure of document 1 would effectively undermine the public interest as regards the protection of international relations. They outlined that the document concerns sanctions and restrictive measures, which are of sensitive and practically complex nature. According to the authorities of Cyprus, public access to the document carries out an

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actual risk of being misinterpreted and misused if released to the public, thereby affecting
the interests of the Republic of Cyprus and the Union as a whole. Disclosure of the
withheld part of the document could put Cyprus in a difficult diplomatic situation and
create implications in its bilateral relations with third countries.

Moreover, the authorities of Cyprus underlined that the exception to the right of access
laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 is an absolute exception
which does not need to be balanced against other interests.

2.2. European Commission’s assessment

I have carried out an assessment at first sight of the reply provided by the authorities of
Cyprus, and I have come to the conclusion that their arguments justify at first view the
non-disclosure of parts of document 1 on the basis of the exception provided for in
Article 4(1)(a), third indent (protection of the public interest as regards international
relations) of Regulation (EC) No 1049/2001. In addition, I have concluded that the parts
of documents 1-4 containing personal data must be withheld based on Article 4(1)(b)
(protection of privacy and the integrity of the individual) of Regulation (EC) No

2.2.1 Protection of the public interest as regards 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 […]’.

In its judgment in Case T-74/16 (Pagkyprios Organismos Ageladotrofon v Commission),
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’.

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’. 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

5 Judgment of the Court of 1 February 2007, Jose Maria Sison v Council of the European Union,
C-266/05 P, EU:C:2007:75, paragraph 46; Judgment of the General Court of 12 September 2013,
6 Judgment of the General Court of 8 February 2018, Pagkyprios Organismos Ageladotrofon v
7 Pagkyprios Organismos Ageladotrofon v Commission judgment, quoted above, paragraph 56.
Article 4(1) to (3) of Regulation 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.\(^8\)

Furthermore, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, the General Court has acknowledged that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] 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’. \(^9\)

Moreover, the General Court ruled that, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation’. \(^10\)

Document 1 refers to an investigation on a possible breach of the restrictive measures set out in Regulation (EU) No 36/2012. The document therefore relates to the sensitive matter of restrictive measures, which constitute an essential foreign policy tool of the European Union. The exception protecting the public interest as regards international relations can therefore apply to the document at issue.

The redacted part of document 1 contains information whose disclosure could put at risk the protection of the international relations. Public access to this information, which was shared among a restricted number of persons in the particular context of a frank dialogue held between the Member State and the European Commission, would put in the public domain specific elements regarding the implementation of the restrictive measures as far as Cyprus is concerned. The disclosure of these elements could jeopardise the relations with third countries. Moreover, revealing such information would be detrimental to the ability of the Member State to conduct such enquiries in the future and to ensure that the measures laid down in the above-referred Council Regulations become effective.

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\(^8\) Idem, paragraph 57.


Hence, I came to the conclusion that public access to the redacted part of the document would pose a risk to the public interest as regards the protection of the international relations. Given the highly sensitive and delicate nature of the subject matter at hand, the potential involvement of identified third countries and media attention to the file, I consider this risk as reasonably foreseeable and not purely hypothetical.

Please note that it is not possible to give more detailed descriptions justifying the need for confidentiality without disclosing the statement of the authorities of Cyprus and, thereby, depriving the exception of its very purpose.11

In light of the above, I must conclude that the use of the exception under Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001 is justified, and that access to the relevant undisclosed part of document 1 must be refused on that basis.

2.2.2 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.


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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’.  

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’.  

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 name of representatives of Member States. The names of the persons concerned as well as other data from which their identity can be deduced undoubtedly 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. 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.

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15 European Commission v The Bavarian Lager judgment, cited above, paragraph 59.
16 Judgment of the Court of Justice of 20 May 2003, Rechnungshof and Others v Österreichischer Rundfunk, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.
17 European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
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. 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 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**

Please be informed that the exceptions laid down in Article 4(1)(a) and (b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

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.

As stated above, partial access is herewith granted to documents 1-4. As regards the limited withheld parts of these documents, I consider that they are covered by the exceptions laid down in Article 4(1)(a), third indent (protection of the public interest as regards the protection of international relations) 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 in the corresponding sections above. No meaningful further partial access to these documents is possible without undermining these interests.
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,

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

**EUROPEAN COMMISSION**

*For the Commission*

Enclosures: (4)