



EUROPEAN COMMISSION

Secretariat-General

The Secretary-General

Brussels, 6.7.2017
C(2017) 4931 final

Ms Helen Darbshire
Access Info Europe
Calle Cava de san Miguel 8, 4ºc,
E - 28005Madrid

DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2017/1364

Dear Ms Darbshire,

I refer to your e-mail of 11 May 2017, by 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 ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 2 March 2017 you requested access to:

- 1. copies of the current versions of the country chapters for each Member State for what would have been the 2017 EU Anti-Corruption Report;*
- 2. copies of all documents relating to the decision not to publish this report, including minutes of all meetings at which this decision was discussed, the lists of participants in those meetings, copies of documents shared before or during such meetings, and relevant correspondence related to the decision-making process;*
- 3. communications between the Commission and Member States relating to forthcoming report and the decision not to make it public, in particular any document and communication received from Member States during the period since the first report was published in 2014 to date, in which the government*

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

representatives either object to or express an opinion in favour of finalising and publishing the reports.

In its initial reply of 19 April 2017, the Directorate-General for Migration and Home Affairs (hereinafter 'DG HOME') identified the following documents:

Category 1:

- the six internal documents containing draft country analyses prepared for discussion at the 13th and 15th meetings of the Expert Group on Corruption held on 30 June 2015 and on 28 June 2016 respectively;

Category 2:

- document 1 - Report of a meeting of 16 December 2016 (Ares(2017)1569514);
- document 2 - Preparatory document for the meeting of 16 December 2016 (Ares(2017)1569040);
- document 3 - Note requesting to launch formal work on preparation of the second EU Anti-Corruption Report (Ares(2016)1595635);

Category 3:

- document 4 - Report of the meeting held on 6 February 2015 with the National Contact Points on corruption (Ares(2015)799245);
- document 5 - Letter to National Contact Points on corruption dated 3 February 2017 (Ares(2017)617150).

DG HOME refused access to the six draft country analyses, based on the exception of Article 4(3), first and second subparagraphs of Regulation 1049/2001 (protection of the decision-making process), and granted wide partial access to the documents under categories 2 and 3, based on the exceptions in Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), first and second subparagraphs of Regulation 1049/2001 (protection of the decision-making process).

Through your confirmatory application you request a review of this position. You furthermore request to verify whether all documents falling under the scope of your application have been identified, and to give access to any additionally identified documents. You put forward a number of arguments to support your request. These are addressed below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General or service concerned at the initial stage.

Having carried out such a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I am pleased to inform you that:

- full access is granted to document 5,
- wider partial access is granted to documents 1 and 3, based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual).

However, I regret to inform you that the refusal of DG HOME to grant full access to the six internal documents identified containing draft country analyses (category 1), and to the redacted parts of documents 1- 4 has to be confirmed, based on the exceptions of Article 4(3), first subparagraph (protection of the decision-making process) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001.

The detailed explanations are provided below.

2.1. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation 1049/2001 provide that:

Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The six draft country analyses (category 1), to which you request access, were drawn up by Commission staff as part of the follow-up to the 2014 EU Anti-Corruption Report. They contain internal, preliminary opinions on corruption issues in some Member States.

The documents falling under categories 2 and 3 refer to the steps forward as regards the EU's anti-corruption policy, the decision of the Commission to publish further editions of the Anti-Corruption Report, and related communications with Member States.

In the course of this follow-up, the Commission services started preparatory work for a second EU Anti-Corruption report, in order to explore formats and methodology for analysis for possible country chapters. The Commission's expert group on corruption was also involved in these reflections. However, such preparations never reached any of the formal steps in the Commission's internal decision-making process: neither a green light to move towards the adoption of a report, nor a discussion on drafts with the responsible Cabinet, nor an inter-service consultation.

Consultations with Member States on draft country chapters formed part of the process leading up to the 2014 report. Such a phase was never reached with respect to the material drafted in view of a possible second report.

The six above-mentioned documents are relevant also for other policy documents being prepared by the Commission services in the framework of the European Semester of Economic Governance, which follows a yearly cycle. On 22 May 2017 the Commission adopted proposals for country specific recommendations², which are to be endorsed by the Council. The analysis in the six documents will be updated and serve as a basis for the 2018 European Semester exercise and onwards.

The documents, drafted for internal use, include the opinions, perceptions, and preliminary considerations of Commission staff members on the challenges, possible strategies and the ways forward to address concerns regarding corruption issues in some Member States. The opinions were expressed for internal use. At the stage at which they were drafted, they were not meant to be transmitted to the public, at least while the Commission's decision-making process is ongoing and the Commission has not yet taken any decision whether, and if so, what action should be taken.

In addition, as some parts of these documents reflect internal considerations, as well as references to views and positions expressed by Member States, the good collaboration and dialogue with different Member States is paramount and the engagement with them is based on a relationship of mutual trust. Public disclosure of the positions of Member States would undermine that necessary climate of mutual trust.

Furthermore, the Commission is treating the issue with the utmost care. Due to the sensitivity of the topic and the attention to which it has given rise, and may further give rise in the media and among stakeholders and the wider public, premature disclosure of the documents would seriously undermine the Commission's decision-making process. Indeed, the release of the documents at this stage would disseminate preliminary, internal considerations into the public domain. It would trigger external pressure by the above-mentioned groups, which could misinterpret the content of the draft documents and draw premature conclusions.

Moreover, such disclosure of documents which are of a preliminary nature would also lead to a risk of self-censorship as these internal documents contain opinions, points of views and critical remarks that will help building the steps to follow. The Commission staff concerned would be hesitant to freely exchange views, both internally and with third parties, were that information to be made public.³ Public disclosure of the documents requested would also seriously undermine the serenity of the ongoing discussions within the relevant Commission services. Indeed, the Commission and its staff members would not be able to explore all possible options free from external pressure.

This, in turn, would seriously undermine the decision-making process protected by Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

² https://ec.europa.eu/info/publications/2017-european-semester-country-specific-recommendations-commission-recommendations_en

³ Judgment of 18 December 2008, *Muñiz v Commission*, case T-144/05 P, EU:T:2008:596, paragraph 89.

The EU Court, in the *ClientEarth*⁴ and *AccessEuropeInfo*⁵ judgments, acknowledged that there may be a need for the Commission to protect internal reflections on the possible policy options available to the institutions in the phase preceding the (inter-institutional) legislative procedure. There is a concrete risk that disclosing the information at this stage would seriously affect the Commission's ability to defend its future proposals. Furthermore, as established in the *Turco* judgment⁶, the Court of Justice distinguished this preliminary assessment of the institution from the presumption of wider openness for the institutions when acting in their legislative capacity.

The sensitive nature of the matter at stake provides further support to the conclusion that certain preliminary assessments and positions must be protected in order to shield the institution's internal assessment from outside pressure and premature conclusions, by the public, until the final decisions are taken⁷.

In light of the foregoing, access to the documents requested is refused based on the exception of Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001, as their disclosure would seriously undermine the decision-making process.

2.2. Protection of personal data

Article 4(1)(b) of Regulation 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.*

In your confirmatory application you argue that *the work telephone numbers of William Sleath (director f.f.) and Matthias Ruete (the Director-General of DG HOME) have been redacted without any justification as the data is publicly available in the Whoiswho directory and in the official initial reply of the Commission in regard to this case.*

I confirm that the European Commission's Staff Directory⁸, publically available on the *Europa* website, includes the full name, surname and the telephone number of staff members holding a senior management position. Therefore, I apologise for this mistake and disclose subsequently the previously redacted telephone and office numbers of the above-mentioned staff of the Commission who hold senior management positions, in particular those mentioned in documents 1 and 5.

⁴ Judgment of 13 November 2015, *ClientEarth v Commission*, Joined Cases T-424/14 and T-425/14, EU:T:2015:848, paragraph 95.

⁵ Judgment of 17 October 2013, *Council v Access Info Europe*, case C-280/11 P, EU:C:2013:671.

⁶ Judgment of 1 July 2008, *Sweden & Turco v Council*, case C-39/05 P and C-52/05 P, EU:C:2008:374.

⁷ Judgments of 1 July 2008, *Sweden & Turco v Council*, case C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69 and judgment of 15 September 2016, *Philip Morris v Commission*, case T-796/14 and T-800/14, EU:T:2016:487.

⁸ 'Who is who' Directory.

Nevertheless, documents 1, 3 and 4, which are partially disclosed to you, contain names of staff of the Commission not occupying any senior management position, or of national experts taking part in relevant meetings of National Contact Points on Corruption or personal information from which their identity can be deduced (names, initials, signatures, positions).

In this respect, Article 4(1)(b) of Regulation 1049/2001 provides that access to documents is refused where disclosure would undermine *the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001⁹ (hereafter, 'Data Protection Regulation') becomes fully applicable¹⁰.

Article 2(a) of the Data Protection Regulation provides that '*personal data*' shall mean *any information relating to an identified or identifiable person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. According to the Court of Justice, there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life"*¹¹. The names¹² of the persons concerned, as well as information from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative¹³.

Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In the recent judgment in the *ClientEarth* case, the Court of Justice ruled that *whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to*

⁹ 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, Official Journal L 8 of 12 January 2001, page 1.

¹⁰ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08P, EU:C:2010:378, paragraph 63.

¹¹ Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹² Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

¹³ Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraphs 77-78.

*assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access*¹⁴. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data¹⁵.

In your confirmatory application, you state that *the disclosure of the names of any Commission officials responsible for and/or intrinsically engaged in those decision-making processes should be provided to the public as there is an evident public interest in knowing who is responsible for developing and taking decisions by EU bodies*.

This line of argumentation is not relevant in the present case, insofar as the redactions only concern the names and contact details of Commission staff not occupying any senior management position, which by definition cannot be seen as being directly responsible in the orientations taken by the institution. The senior management level is the appropriate level to be taken into account for the necessary public scrutiny to which you refer.

You also argue that *the public has a strong right to know who has been engaged in this process both for reasons of scrutiny by the citizens of Member States of their representatives as well as for reasons of the broader scrutiny of all EU citizens and residents of the persons involved in EU process*.

I would like to emphasise that the names of organisations and/or national authorities, to which the experts whose personal data appear in the documents are affiliated, were not redacted. In the light of the above, I consider that the transfer of the personal data of the individual national experts would go beyond what is necessary for attaining your objective.

Therefore, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. PARTS FALLING OUTSIDE THE SCOPE OF YOUR REQUEST AND OUTSIDE OF REGULATION 1049/2001

Following a renewed, thorough search of the documents in possession of the Commission, I regret to inform you that the Commission has not identified any other document falling under the scope of your initial request for access to documents.

In accordance with Article 2(3) of Regulation 1049/2001, the right of access as defined in that Regulation applies only to existing documents *held by an institution*. This principle has been confirmed by the EU Court of Justice on several occasions. In its judgment of

¹⁴ Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

¹⁵ Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

21 July 2011, the Court of Justice concluded that *Article 2(3) of that regulation states that the latter applies to all documents held by an institution, that is to say drawn up or received by it and in its possession, in all areas of Union activity*¹⁶.

In part 1.1 of your confirmatory application you asked the Commission to confirm that the versions of the Country *chapter presented at the 28 June 2016 meeting are indeed the latest versions and that no work was done on them between that date and the 16 December 2016 meeting, when decision not to proceed with the publication of the Anti-Corruption Report was taken.*

In this respect, I would like to underline the preliminary status of these documents. These documents were subject to internal discussion at service level at various moments. The Commission's expert group on corruption was also involved in these reflections. However, such preparations never reached any of the formal steps in the Commission's internal decision-making process: neither a green light to move towards the adoption of a report, nor a discussion on drafts with the responsible Cabinet, nor an inter-service consultation. Nor was any consultation with Member States held on draft country chapters.

In part 2.2 of your confirmatory application you refer to document 3 and argue that *the Commission has failed to indicate which parts of the document and which proportion of the redactions are exempted under the protection of decision-making and which under the ground that they fall outside the scope of the request.* You asked that *this be made clear.*

Please note in this respect that the very limited redactions on pages 1 and 2 of document 3 are based on the exceptions of Article 4(3), first subparagraph (protection of decision-making) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. The table to the note is fully disclosed. The parts under titles 'Reviewing the EU institutions' and 'Other international development' of the minutes of the Inter-service Group on Corruption of 17 February 2017, annexed to this note, do not fall under the scope of your initial request for access. The remaining redacted parts of these minutes fall under the exception of Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001. The new version of this document reflecting the above-mentioned information will be attached to the confirmatory decision.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) of Regulation 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.

¹⁶ Judgement of 21 July 2011, *Sweden v MyTravel and Commission*, C 506/08 P, EU:C:2011:496, paragraph 88.

In your confirmatory application, you argue that *the public interest in this information is particularly strong*.

Anticorruption efforts are an issue of deep public interest, due to the fact that corruption directly impacts the public, either via the stealing of public funds for private enrichment, the illicit capture of policy making and legislation by private interests, or including the negative effect on fundamental rights.

Finally, access to the information would ensure public debate is carried out using a comprehensive compilation of facts and comparative information- data and evidence compiled with European taxpayer's money- rather than simply through selective evidence or high profile corruption scandals that maybe do to actually represent adequately the most important blackspots in anticorruption efforts.

I would like to stress in this respect that the Commission remains fully convinced of the need to combat and prevent corruption and is committed to continuing its work in this field¹⁷. It is in the common interest to ensure that all Member States have effective anti-corruption policies and that the EU supports the Member States in pursuing this work. Most recently, fighting corruption has become a key element of the European Semester process of Economic Governance¹⁸. The latter will become the key vehicle for supporting Member States in pursuing anti-corruption work, the Commission will continue its anti-corruption experience-sharing programme, legislative action at EU level in targeted areas where the EU can make a difference and work to fight irregularities and fraud and risks of corruption in the implementation of EU funds.

To the contrary, as explained above, since the decision-making process is ongoing, full disclosure of the internal documents requested would affect the Commission's ability to act freely from external pressure in exploring all possible options at the current preparatory stage. I therefore consider that such disclosure would be contrary to the public interest, as it would have the effect of undermining the quality of the results of the Commission's deliberations.

Furthermore, please be assured that the Commission interpreted and applied the exceptions of Article 4 of Regulation 1049/2001 strictly, which resulted in full access to document 5 and wider partial access to document 1.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interests in safeguarding the protection of decision-making process, based on Article 4(3) of Regulation 1049/2001.

¹⁷ For more information please see http://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption_en

¹⁸ https://ec.europa.eu/info/publications/2017-european-semester-country-reports_en;
https://ec.europa.eu/info/files/2016-european-semester-communication-country-specific-recommendations_en

5. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, *if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.*

In accordance with that provision, I have granted full access to document 5, and wider partial access to document 1 by redacting only personal data based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual).

However, for the reasons explained above, no further partial access is possible to documents 1, 2, 3 and 4 without undermining the Commission's on-going decision-making process and the protection of privacy and the integrity of the individual.

6. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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
Alexander ITALIANER
Secretary-General*