



EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2018/5700**

Dear Mr Schindler,

I refer to your e-mail of 13 December 2018, registered on 25 December 2018, 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<sup>2</sup> (hereafter ‘Regulation (EC) No 1049/2001’).

**1. SCOPE OF YOUR APPLICATION**

In your initial application of 30 October 2018, you requested access to documents in relation to ‘[...] flash cards employed in meetings on trade policy between Donald Trump and Jean-Claude Juncker’. You listed the categories of documents that you were interested in:

- ‘a) A list of documents prepared for these meetings.
- b) The visual and graphical elements used to create these flash cards, in electronic form if possible.
- c) Any information (emails, notes, memos, protocols, letters, drafts) concerning the design and approval process of these flash cards’.

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

In your initial application, you underlined that ‘[you are] not seeking [access to] the actual content of the flash cards’ and that your application covers ‘non-important information (short-living documents, drafts, emails that are not filed)’.

Your application was attributed to the Directorate for Interinstitutional and External Relations of the Secretariat-General of the European Commission for handling and reply.

In its initial reply of 13 December 2018, the Directorate for Interinstitutional and External Relations of the Secretariat-General of the European Commission informed you that it does not hold any documents such as those referred to you in your initial application. Indeed, according to the reply of the Directorate for Interinstitutional and External Relations of the Secretariat-General of the European Commission, the flash-cards themselves were considered as short-lived support material and the same applies to all categories of documents listed in your initial application.

In your confirmatory application, you request a review of this position. In particular, you argue that ‘[t]he European Commission is applying an absurdly narrow definition of “document” that is not backed up by the Regulation 1049/2001’. You also underline that ‘[if it applied] a reasonably broad definition of [the] document, including less relevant ones, not registered or archived ones such as memos, drafts, notes, emails, etc, the Commission could have answered to [your] request for documents’.

## **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.

At the outset, I would like to recall that, according to a well-established case law, the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned<sup>3</sup>.

Following your confirmatory application, 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 document to which you refer in point a) (‘[l]ist of documents [...]’) and c) (‘emails, notes, memos, protocols, letters, drafts [...] concerning the design and approval process of [the] flash cards’) of your confirmatory application.

With regard to point b) of your confirmatory application, relating to ‘[t]he visual and graphical elements used to create [the] flash cards’, the documents, which contain the content of the ‘flash cards’, are the following:

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<sup>3</sup> Judgment of the Court of Justice of 11 January 2017, *Typke v Commission*, C-491/15 P, EU:C:2017:5, paragraph 31 and Judgement of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache*, C-448/18 P, EU:C:2019:77, paragraph 14.

- Keynote speech 'Transatlantic relations at a crossroads' by President Juncker at the Centre for Strategic and International Studies (CSIS), publicly available here: [http://europa.eu/rapid/press-release\\_SPEECH-18-4690\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-18-4690_en.htm);
- Statement by President Jean-Claude Juncker at the joint press conference in the White House Rose Garden with Donald Trump, President of the United States, publicly available here: [http://europa.eu/rapid/press-release\\_SPEECH-18-4701\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-18-4701_en.htm);
- Joint U.S.-EU Statement following President Juncker's visit to the White House, publicly available here: [http://europa.eu/rapid/press-release\\_STATEMENT-18-4687\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-18-4687_en.htm).

Regarding other documents created by the European Commission specifically for the purpose of the preparation of the 'flash cards', as explained by the Directorate for Interinstitutional and External Relations of the Secretariat-General of the European Commission in its initial reply, and in conformity with the abovementioned case-law, Article 2(3) of Regulation (EC) No 1049/2001 provides that the right of access as defined in that regulation applies only to existing documents in the possession of the institution. In line with the wording of the above-mentioned article, the documents should be 'drawn up' or 'received' by the institution (in the case at hand, by the European Commission).

In order to consider it as 'drawn up by the European Commission' a document must fulfil certain criteria, among others, it may not contain information that is short-lived and its contents must be 'stable', which means that it must have been endorsed at the appropriate hierarchical level. If a document fulfils the necessary criteria of 'document drawn up by the European Commission', it is registered in the corporate document management systems of the European Commission.

Consequently, the documents referred to in point b) of your confirmatory application can be considered as 'documents drawn up by the European Commission', only if the criteria for considering them as such are met.

Nonetheless, in the case at hand, as explained by the Directorate for Interinstitutional and External Relations of the Secretariat-General of the European Commission in its initial reply, the documents concerned were considered as not fulfilling the above-mentioned criteria and therefore were not registered in the corporate document management systems of the European Commission. Indeed, as the flash-cards themselves were considered as short-lived support material, the same applies to the 'graphical continent' referred to by the applicant.

Consequently, the European Commission has not identified any documents (other than those publicly available mentioned above) held by it that would fall under the scope of your application for access to documents.

Given that no such documents have been identified, the European Commission is consequently not in a position to handle your application.

### **3. 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*  
*Martin SELMAYR*  
*Secretary-General*