



EUROPEAN COMMISSION

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Mr Chris Jones
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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/62**

Dear Mr Jones,

I refer to your letter of 27 March 2019, registered on 28 March 2019, 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 documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

On 19 December 2018 you submitted an initial application to the Directorate-General for International Cooperation and Development of the European Commission, in which you requested access to 'all documents generated by the [European] Commission in relation to the following projects:

- 1) HLWG/2001/118: GED-DPG: technical equipment and training for border control, fighting illegal immigration and detection of falsified documents, funded in 2001 in the framework of the budget line B7-667;
- 2) 2001/HLWG/103: French MoI/National police: financial and technical assistance for combating illegal migration, funded in 2001 in the framework of the budget line B7-667;

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

² Official Journal L 145 of 31.5.2001, p. 43.

3) MIGR/2005/103-569 PROJECT SEAHORSE, funded in 2004 in the framework of the AENEAS program;

4) MIGR/2006/120-179 Project SEAHORSE NETWORK, funded in 2005 in the framework of the A[ttaining] E[nergy-Efficient] M[obility in an] A[geing] S[ociety] program’.

In your application you underlined that it covers ‘[p]roject evaluations and breakdown of the actions implemented in the framework of each project’, which interest you particularly.

The projects listed in your initial application fall under the competence of two different Directorates-General of the European Commission. Your application was therefore attributed for handling and reply to:

- Directorate-General for Migration and Home Affairs, in so far as the projects mentioned in points 1 and 2 of your application are concerned (this part of your application was registered under reference number GESTDEM 2019/62);
- Directorate-General for International Cooperation and Development, in so far as the projects mentioned in points 3 and 4 of your application are concerned (this part of your application was registered under reference number GESTDEM 2018/6890).

With regard to the part of your application registered as GESTDEM 2019/62, the Directorate-General for Migration and Home Affairs identified 20 documents as falling under its scope³. In its reply of 6 March 2019 it entirely refused access to 19 of the documents, based on the exceptions provided for in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001, Article 4(1)(b) of that regulation and Article 4(2), first indent, of the above-mentioned regulation. The exceptions invoked protect, respectively, public interest as regards the public security, privacy and the integrity of the individual and commercial interests of a natural or legal person. The Directorate-General for Migration and Home Affairs also informed you that document 20 was publically available and provided you the hyperlink where it can be consulted.

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

Please note that this decision concerns only the documents falling under the part of your application registered as Gestdem 2019/62. Therefore, it covers the documents identified and denied public access by the Directorate-General for Migration and Home Affairs.

³ The list of the documents containing their titles and reference number was attached to the reply of the Directorate-General for Migration and Home Affairs of 6 March 2019.

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.

Document 1-4, 6, 7, 9-11, 13, 15, 15a, 17 and 18 identified as falling under the scope of your application originate from a third party. Indeed, documents 1-4, 6 and 7 originate from the authorities of Spain and documents 9-11, 13, 15, 15a, 17 and 18 from the French authorities.

Under the provisions of Article 4(4) and 4(5) of Regulation (EC) No 1049/2001 and with a view to taking into account the arguments put forward in your confirmatory application, the Secretariat-General consulted the Spanish and French authorities on 3 May 2019.

The originator of documents 1-4, 6 and 7 (the authorities of Spain) opposed to the disclosure of the documents, based on the exception provided for in Article 4(1)(a), first indent and third indents⁴, of Regulation (EC) No 1049/2001 (protection of the public interest as regards the public security and as regards international relations).

Having carried out a detailed examination of the documents concerned, and taking into account the result of the third party consultation, I can inform you that partial access is granted to documents 1, 4 and 6. At first sight⁵, the exception of Article 4(1)(a), first and third indents, of Regulation (EC) No 1049/2001 (protection of the public interest as regards public security and as regards international relations) is indeed not capable of justifying the refusal of access to the entirety of the documents.

Nonetheless, I consider that this exception indeed applies to the relevant withheld parts of document 1, and to the entirety of documents 2, 3 and 7 to which access is refused, based on the above-mentioned exceptions. Furthermore, the relevant additional parts of the documents 1, 4 and 6 were redacted, based on the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of individual).

Please note, however, that the actual transmission of the documents at issue is subject to the position that will be taken by the Spanish authorities, as referred to in point 5 of this decision.

With regard to documents 9-11, 13, 15, 15a, 17 and 18, the authorities of France agreed to partial disclosure, with the relevant parts redacted based on the exceptions provided

⁴ In their reply, the Spanish authorities referred to Article 4(1)(a) of Regulation (EC) No 1049/2001, without indicating the particular indent of that article. However, from the substance of their argumentation, it is clear that they referred to the exceptions provided for in these indents.

⁵ Judgment of the General Court of 8 February 2018, *Pagyprios organismos ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 57.

for in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001 and in Article 4(1)(b), as well as Article 4(2), first indent, of that regulation.

Regarding documents originating from the European Commission (documents 5, 8, 12, 14, 16 and 19), following my review, I am pleased to inform you that (wide) partial access is granted thereto. The withheld parts of the documents are covered by the exceptions provided for in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001, Article 4(1)(b) of that regulation and Article 4(2), first indent, of the above-mentioned regulation. The exceptions, as mentioned above, protect, respectively, public interest as regards the public security, privacy and the integrity of the individual and commercial interests of a natural or legal person.

The detailed reasons are set out below.

2.1 Protection of the public interest as regards public security

Article 4(1)(a), first 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 public security'.

The relevant undisclosed parts of documents 1, 11, 13, 15, 15a and 17 contain information relating to the operational details of the cooperation between the French and Spanish authorities with the authorities of third countries in the context of the actions against the illegal immigration and human trafficking. Indeed, the withheld information includes the details of actions undertaken in the context of the projects in question, such as the description of the equipment purchased, place of its deployment and channels of the exchange of information between the immigration and police authorities of the countries concerned.

Illegal migration, and more particularly the fight against human trafficking, is a very sensitive issue. Public disclosure of detailed information about the cooperation between the countries affected by that problem would result in undermining the public interest as regards public security. There is a realistically foreseeable and not hypothetical risk that disclosure of this information to the public at large would undermine the actions intended against the illegal migration and human trafficking. The illegal migration channels would use the disclosed information to counter the measures designed to control them, by having the specific knowledge of the operational details of the actions.

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001 is justified concerning the redacted information included in documents 1, 11, 13, 15, 15a and 17 and that access to them must be refused on that basis.

2.2 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 [...]'].

As far as the protection of international relations is concerned, the EU Court has acknowledged that the institutions enjoy a wide discretion when considering whether access to a document may undermine that public interest⁶.

The relevant withheld parts of document 1 and documents 2, 3 and 7 include information regarding the difficulties encountered in the implementation of the project concerned. The information describes the details of relations and interactions between the authorities of the Member State and a third country in the context of that project. It is not possible to provide more detailed description of the nature of the information included in the documents, without actually undermining the exception in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

Public disclosure by the European Commission of the above-mentioned information against the explicit opposition of the originator (as explained in point 2 of this decision) would put the EU in a difficult situation towards the authorities of the Member State and the third country concerned, as well as would undermine the bilateral relations between them.

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

2.3 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'.

In this context, please note that in its judgment in Case C-28/08 P (*Bavarian Lager*)⁷, the Court of Justice ruled that when an application 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 data⁸ ('Regulation (EC) No 45/2001') becomes fully applicable.

⁶ Judgment of the Court of First Instance of 25 April 2007, in Case T-264/04, *WWF European Policy Programme v Council*, EU:T:2007:114, paragraph 40.

⁷ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as '*European Commission v The Bavarian Lager judgment*'), C-28/08 P, EU:C:2010:378, paragraph 59.

⁸ Official Journal L 8 of 12.1.2001, p. 1.

As from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) No 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/EC⁹ ('Regulation (EU) No 2018/1725').

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 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'.¹⁰

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.¹¹

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'.¹¹

Documents 1-19 contain the names, surnames, initials, shortened names and contact details (telephone number, office location, email addresses) of the staff members of the European Commission who do not hold any senior management position and of the third parties (officials of the Spanish and French Ministries and Police). They contain also the names and surnames of the persons involved at implementation of the project concerned at operational level. Additionally, the documents contain biometric data (handwritten signatures of the staff member of the European Commission or the third parties).

The names¹² of the persons concerned as well as other data from which their identity can be deduced constitute personal data in the meaning of Article 2(a) of Regulation (EU) No 2018/1725.

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'.

⁹ Official Journal L 205 of 21.11.2018, p. 39.

¹⁰ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 59.

¹¹ Judgment of the Court of Justice of 20 May 2003, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹² *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

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.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine of its own motion the existence of a need for transferring personal data.¹³ This is also clear from Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, the European Commission has to examine the further conditions for a 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 weighted the various competing interests.

Consequently, I consider that the necessity for the transfer of personal data (through its public disclosure) included in documents 1-19 has not been established. 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, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by 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 disclosure of the personal data concerned.

Furthermore, as the handwritten signatures, are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

2.4 Protection of commercial interests of a natural or legal person

Article 4(2), first 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 commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'.

¹³ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

The undisclosed parts of documents 9, 10, 11, 13, 15, 15a, 16 and 17 contain detailed information relating to the financial aspects of the implementation of the projects that reflects and complements the description of work included in the project proposal. That includes, for instance, the names of the economic operators to which particular tasks of the project were entrusted and the financial breakdown of the planned and actually incurred costs of the project. The level of detail is very high, it goes down to the description of the purchases and services at the level of individual invoices stipulating the names of the providers and amounts billed.

Information included in the relevant redacted parts of the above-mentioned documents has to be considered as commercially sensitive business information.

Its public disclosure, through the release of the above-mentioned withheld (parts of) documents under Regulation (EC) No 1049/2001, would clearly undermine the commercial interests of the economic operators that were involved in the projects in question. Indeed, it would reveal the details of the financial planning and execution of the project, which reflects the particular expertise, network of subcontractors, of the grant beneficiaries. It can be presumed that the information concerning details of the implementation of the project (reflecting the description of work included in the proposal of the project), or financial data was provided under the legitimate expectation that it would not be publically released.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators in question. I conclude, therefore, that access to the undisclosed parts of 9, 10, 11, 13, 15, 15a, 16 and 17 must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(a) and Article 4(1)(b) of Regulation (EC) No 1049/2001 does not need to be balanced against overriding public interest in disclosure.

The exceptions laid down in Article 4(2) of Regulation (EC) No 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.

In your confirmatory application you argue that ‘[...] public spending should be submitted to the widest possible scrutiny and debate, particularly when it concerns issues as sensitive as those arising from the manner in which democratic societies seek to protect their borders. There is indeed an overriding public interest in releasing the document, or at least those parts of it that concern matters of financial, legal or policy nature (as opposed to concrete operational measures)’.

Please note however that the Court of Justice, in the *Strack* case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient

to merely rely on that principle and its importance¹⁴. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹⁵.

Furthermore, the (wide) partial access is indeed granted to the documents falling under the scope of your application, except for documents 2, 3 and 7. With regard to the undisclosed (parts of) the documents which contain, as explained in parts 2.1 and 2.2 of this decision, the information regarding operational aspects of the projects (which is protected by virtue of the exception in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001) and bilateral relations of the Member State and a third country (which is protected by virtue of the exception in Article 4(1)(a), third indent, of that regulation), in my view, such a pressing need has not been substantiated in this case. While I appreciate that there is public interest regarding the implementation of the EU budget, I consider that the need for full transparency does not outweigh in this case the need to protect the limited undisclosed parts of the documents concerned pursuant to the exception relating the protection of commercial interests.

This conclusion is reinforced by the fact that the European Commission provided significant amount of information about the project in question to the public, through proactive publication of document 20.

4. PARTIAL ACCESS

(Wide) partial access is hereby granted to documents 1, 4-6, 8-19.

With regard to documents 2, 3 and 7, majority of their content is covered by the exception provided for in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001. The remaining part of the documents contain personal data that is protected by the exception in Article 4(1)(b) of the said regulation. Consequently, no meaningful partial access is possible to the above-mentioned documents.

5. DISCLOSURE AGAINST THE EXPLICIT OPINION OF THE AUTHOR

According to Article 5(5) and (6) of the detailed rules of application of Regulation (EC) No 1049/2001¹⁶, '[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. If the Commission intends to give access to a document

¹⁴ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 128 (hereafter *Strack v Commission*).

¹⁵ *Strack v Commission*, cited above, paragraph 129.

¹⁶ Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), Official Journal L 345 of 29.12.2001, p. 94.

against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.’

Since the decision to grant partial access is taken against the objection of the third-party author, the European Commission will inform the authorities of Spain of its decision to give partial access to the documents 1, 4 and 6. The European Commission will not grant such disclosure until a period of ten working days has elapsed from the formal notification of this decision to the third party author, in accordance with the provisions mentioned above.

This time period will allow the third party author to inform the European Commission whether it intends to object to the disclosure using the remedies available to it, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the third-party author has not signalled its intention to avail itself of the remedies at its disposal, the European Commission will forward the redacted documents to you.

6. 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,



*For the Commission
Martin SELMAYR
Secretary-General*

Enclosures: (17)