



EUROPEAN COMMISSION

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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 2019/768**

Dear Ms Friel,

I refer to your email of 2 May 2019, registered on 3 May 2019, in 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR APPLICATION

In your initial application of 8 February 2019, you requested access to, I quote, ‘[...] documents related to the total allowable catches (TACs) for fish stocks in the Northeast Atlantic for 2019’. You explained that your initial application covers, I quote:

‘1. Any records, minutes or notes of meetings/discussions that took place between the [European] Commission and the Member State representatives on the T[otal]A[llowable]C[atch]s for 2019, including any minutes or notes of Council working party/ministerial meetings taken by Commission staff, and any internal [European] Commission briefings on the subject. [...]

2. A full table of all proposed and agreed quota adjustments (such as those previously referred to as quota top-ups or any deductions) to account for a) catches that could be

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

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

discarded before the introduction of the landing obligation, but now will have to be landed and b) exemptions from the landing obligation (in tonnes and %), and T[otal]A[llowable]C[atch]s before the adjustments (top-ups or deductions) were applied;

3. A detailed description of the methodology used to calculate quota adjustments (top-ups or deductions);

4. The calculations that the proposed and agreed quota adjustments (top-ups or deductions) were based on, ideally in Excel spreadsheet format.

5. [...] any documents relating to exemptions from the landing obligation within the period commencing with the S[cientific], T[echnical] and E[conomic] C[ommittee] for F[isheries] Expert Working Group 18 of June 2018 and ending with the [European] Commission's adoption of the draft discard plans for 2019 in October 2018, including any correspondence between the [European] Commission and the Member States and any records, minutes or notes of meetings/discussions that took place between the [European] Commission and the Member States regarding this matter.'

With regard to point one of your initial application, you clarified that, I quote, '[you] do not seek access to the [European] Commission's legislative proposals for the 2018 T[otal]A[llowable]C[atch]s, unless such documents are annotated and/or contain negotiation directives. [You] also do not seek access to the documents that are publicly available in the Council's document register, filed under interinstitutional code 2018/0380 (NLE) at the date of [your] request'.

Your initial application was attributed to the Directorate-General for Maritime Affairs and Fisheries for handling and reply. It identified 114 documents as falling under the scope of your application and in the initial reply, provided on 4 April 2019, granted wide partial or full access to the majority of them.

Indeed, the Directorate-General for Maritime Affairs and Fisheries granted full or wide partial access to 108 documents corresponding to points 3, 4 and 5 of your initial application. In the documents which were not fully disclosed, the Directorate-General for Maritime Affairs and Fisheries redacted personal data, based on the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

With regard to the remaining six documents³, corresponding to points 1 and 5 of your application, the Directorate-General for Maritime Affairs and Fisheries refused access thereto. It invoked the exceptions provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001 (protection of commercial interests of a natural or legal person) and Article 4(3), second subparagraph, of the said regulation (protection of the decision-making process).

³ The list of these documents was included in the initial reply of the Directorate-General for Maritime Affairs and Fisheries of 4 April 2019.

The Directorate-General for Maritime Affairs and Fisheries also informed you that it did not hold any documents falling under point 2 of your initial application.

On 2 May 2019 you submitted the confirmatory application. In that application, you contest the statement of the Directorate-General for Maritime Affairs and Fisheries, according to which it does not hold any documents corresponding to point 2 of your initial application (documents relating to the quota adjustments).

Furthermore, you also argue that the European Commission holds more documents relating to point 1 of the initial application, which, in your view, should have been identified by the Directorate-General for Maritime Affairs and Fisheries and disclosed.

Following your confirmatory application, the European Commission identified one additional document falling under point 1 of your initial application:

Note to the Members of the European Commission, dated 11 January 2019, containing the summary record of the meeting of the Council of the European Union (Agriculture and fisheries) of 17-18 December 2018, reference SI(2019)30 (hereafter ‘the new document’).

With regard to the six documents withheld at the initial stage, I would like to inform you that document entitled ‘La selectividad del arte de pesca del voraz del Estrecho de Gibraltar’ is a publically available document⁴.

Consequently, your confirmatory application is limited to the issue of documents falling under points 1 and 2 of your initial application and the five documents, to which access was refused in the initial reply of the Directorate-General for Maritime Affairs and Fisheries. I note, however, that you do not contest the applicability of the exceptions invoked at the initial stage by the above-mentioned Directorate-General to refuse access to the five documents concerned.

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 your confirmatory application, the European Commission has carried out a renewed, thorough search for documents corresponding to points 1 and 2 of your initial application. Following this renewed search, it identified one new document, corresponding to point 1 of your application. With regard to the documents mentioned in point 2 of your initial application, I confirm that the European Commission has not identified any document falling under the scope of your application.

⁴ <https://rodic.uca.es/xmlui/handle/10498/14855>.

Indeed, as regards the documents corresponding to point 2 of your initial application, concerning the quota adjustments (on the Total Allowable Catch for 2019), the European Commission would like to underline that it disclosed at the initial stage the working document distributed to the Member States in November 2018, which contains the calculations applied to the deductions. I note that points 2, 3 and 4 of your initial application, are closely connected, as they all relate to the issue of the Total Allowable Catch quotas adjustments. Consequently, the above-mentioned document was understood by the Directorate-General for Maritime Affairs and Fisheries as corresponding to point 4 of your initial application, although it contains information allowing to consider that it relates also to point 2.

With regard to the actual content of the above-mentioned document, please note that the discrepancies observed between the initial proposal of the European Commission and the final adopted Total Allowable Catch is the result of political negotiations carried out during the Council ministerial meeting. Consequently, no Commission documents exist that corresponds to point 2 of your initial application. If any such documents were indeed held by the Council, you are invited to contact the Council Secretariat for access to such documents.

In line with the provisions of Article 2(3) and Article 10 of Regulation (EC) No 1049/2001, the right of access guaranteed by that Regulation applies only to existing documents in possession of the institution concerned.

Article 2(3) of Regulation (EC) No 1049/2001 provides that ‘[t]his Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union’.

Article 10(3) of the above-mentioned regulation provides that ‘[d]ocuments shall be supplied in an existing version and format [...]’.

In the light of the above, given that the European Commission holds no documents corresponding to point 2 of your initial application, it is not possible to handle this part of your confirmatory application.

As regards the new document identified following your confirmatory application, I would like to inform you that partial access is granted thereto. The undisclosed parts of the document concerned require protection under the exceptions in Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 4(3), first subparagraph, of that regulation. Please note that the relevant parts of the document concerned contain information unrelated to total allowable catches (for example, relating to the issues of the Common Agricultural Policy). This information falls outside the scope of your application Gestdem 2019/768 and was redacted as such.

With regard to the remaining five documents, I have to confirm the position of the Directorate-General for Maritime Affairs and Fisheries refusing access thereto. The exceptions applicable are those provided for in Article 4(1)(b) of Regulation (EC) No

1049/2001 (protection of privacy and the integrity of individual) and Article 4(3), first subparagraph, of that regulation (protection of the decision-making process).

The detailed reasons are set out below.

The assessment is based on a restrictive interpretation of the exceptions of Regulation (EC) No 1049/2001, in accordance with Article 6 of Regulation (EC) No 1367/2006⁵.

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 relevant parts of the documents disclosed partially at the initial stage. I would like, however, to provide additional explanations concerning the impact, which their public disclosure would have on the interest protected by that exception.

In this context, please note that in its judgment in Case C-28/08 P (*Bavarian Lager*)⁶, 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 data⁷ (‘Regulation (EC) No 45/2001’) becomes fully applicable.

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/EC⁸ (‘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

⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Official Journal L 264, of 25.9.2006, p. 13–19.

⁶ 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.

⁷ Official Journal L 8 of 12.1.2001, p. 1.

⁸ Official Journal L 205 of 21.11.2018, p. 39.

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’.⁹

Article 3(1) of Regulation (EU) No 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’.¹⁰

The relevant parts of 108 documents (partially) disclosed at the initial stage, as explained by the Directorate-General for Maritime Affairs and Fisheries in its initial reply, contain the names, functions and handwritten signatures of the staff members of the European Commission who do not hold any senior management position. They also include the names and contact details of third party representatives (representatives of the authorities of the Member States).

The same information is included in five documents to which access was fully refused at the initial stage and in the new document identified following your confirmatory application.

The names¹¹ 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’.

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.¹² This is also clear from Article 9(1)(b) of Regulation (EU) No 2018/1725, which

⁹ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 59.

¹⁰ 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.

¹¹ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

¹² 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.

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.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Consequently, I consider that the necessity for the transfer of personal data (through its public disclosure) included in the documents concerned 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.

2.2 Protection of the decision-making process

Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 provides that '[a]ccess 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'.

As explained in point 1 of this decision, in your confirmatory application you do not contest the applicability of the above-mentioned exception to five documents, undisclosed by the Directorate-General for Maritime Affairs and Fisheries at the initial stage. I would like, however, to provide additional explanations concerning the impact, which their public disclosure would have on the interest protected by that exception.

As explained by the Directorate-General for Maritime Affairs and Fisheries in its initial reply, all five documents withheld at the initial stage and the relevant undisclosed parts of the new document identified following your confirmatory application, contain

description of the positions of the Member States, as well as the opinions thereon of the representatives of the European Commission, expressed during the negotiating phase, preceding the adoption of the decision on total allowable catch on 18 December 2018. They were drafted for internal purposes and as part of the preliminary consultations within the European Commission. The opinions included in these documents only reflect the understanding of the authors of the positions of the Members states expressed during the early stages of the negotiations and they were drafted under the legitimate expectation that they would not be made public. For the negotiations to have a successful outcome, it is essential that there is an atmosphere of mutual trust between the negotiating parties and that the frank exchange of views in a preparatory phase of Commission officials can be protected from public disclosure.

Although the decision regarding total allowable catch for 2019 has been adopted by the Council on 18 December 2018, the process of fixing of fishing opportunities is still ongoing throughout the year, in particular through various amendments and the fixing of fishing opportunities for the next year. Therefore, disclosure of the documents requested would seriously undermine the decision-making process protected by Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

With regard to the official record of the exchanges between Member States and the Commission on this topic, such exchanges are always taking place during Council meetings. Therefore, you may want to consult the comprehensive report of the Council proceedings, which is now publicly available.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

The exception laid down in Article 4(3) 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 underline the importance of the subject matter to which the requested documents relate and refer in this context to the provisions of Regulation (EC) No 1367/2006. Indeed, you point out in this context that, quote, ‘[...] records of the deliberations on T[otal] A[llowable] C[atch]s at the Agricultural and Fisheries Council and relevant meetings of the Council’s preparatory bodies constitute “environmental information” and , as such, the obligations contained in Regulation [(EC) No] 1367/2006 must [...] be upheld’.

Consequently, in your view, an overriding public interest warrants the disclosure of the relevant parts of the five documents and the undisclosed parts of the new document, which reflect such deliberations. This interest is based on a general need for public transparency linked to the importance of the subject matter, reinforced by the fact that the

undisclosed information constitute environmental information within the meaning of Regulation (EC) No 1367/2006.

Please note, however, that no overriding public interest in disclosure can automatically be derived from the provisions of Article 6 of Regulation (EC) No 1367/2006 as regards the exception set out in Article 4(3) of Regulation (EC) No 1049/2001. In case of the latter exception, Article 6 merely requires interpreting the grounds for refusal restrictively whenever the information requested relates to emissions into the environment, taking into account the public interest served by disclosure and whether the information requested relates to emissions to the environment.

The information included in the five documents and undisclosed parts of the new document, as explained in point 2.2 of this decision, are the positions of the Member States, as well as the opinions thereon of the representatives of the European Commission. It follows that it may not be considered as information relating to emissions to the environment in the sense of Article 6 of Regulation (EC) No 1367/2006.

As regards your general reference to the alleged existence of a general need for public transparency in this case, I would like to refer to the judgment in the *Strack* case¹³, where the Court of Justice 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 importance, but that 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-disclosure¹⁴.

In my view, such a pressing need has not been substantiated in this case. Whilst I understand that there can be a public interest in obtaining access to the undisclosed information included in the documents in question, I consider in this case that any possible public interest in transparency cannot outweigh the public interest in protecting the decision-making process falling under the exception provided for in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interest in safeguarding the commercial interests of the car manufacturers concerned and the decision-making process falling under the exceptions provided for in the first indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation 1049/2001.

4. PARTIAL ACCESS

Partial access is hereby granted to the new document identified following your confirmatory application.

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

¹⁴ *Strack v Commission* judgment quoted above, paragraph 129.

With regard to the five documents to which access is refused, no meaningful partial access is possible, as their entire content is covered by the exceptions provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of individual) and Article 4(3), first subparagraph, of that regulation (protection of the decision-making process).

5. 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