



EUROPEAN COMMISSION

Brussels, 13.2.2020  
C(2020) 911

Mr Alvaro Merino  
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Spain

**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 applications for access to documents under  
Regulation (EC) No 1049/2001 – GESTDEM 2019/6677**

Dear Mr Merino,

I refer to your email of 8 January 2020, registered on the same day, in which you submit a confirmatory applications 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**

On 13 November 2019, you submitted an initial application for access to documents, which, I quote: ‘contain the following information:

- Number of people currently registered in the reserve lists from which EU institutions can recruit new staff members, specifying their age, gender, nationality and possible portfolio.
- Number of candidates recruited by any EU body monthly from 2003 onwards, specifying the recruiting institution and the position, age, gender and nationality of the new employee.
- Number of tests conducted monthly from 2003 onwards, specifying the percentage of successful candidates (laureates), the nationality of all candidates and the position offered.

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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.

- From those successful candidates from 2003 onwards, percentage of laureates per country, age and gender.’

The European Commission attributed your application to its European Personnel Selection Office for handling and reply, which identified the following document as falling under its scope:

- Excerpt extracted from the statistical tool ‘i:stat – ESTER’, dated 18 December 2019. Reference: Ares(2019)7793575 (hereafter ‘identified document’).

The above-mentioned document was created during the handling of your initial application Gestdem 2019/6677, through the extraction of the relevant data fields from the informatics tool ‘i:stat’, which stores the entirety of the statistical data concerning competitions and selections organised by the European Personnel Selection Office.

In the reply of 6 January 2020, the European Personnel Selection Office granted wide partial access to the document requested. As the identified document include the information falling outside the scope of your initial application, the European Personnel Selection Office redacted it as such. It also redacted the personal data included in the document<sup>3</sup>.

In your confirmatory applications, you question that position. Indeed, in your confirmatory application you underline that, I quote, ‘[t]he scope of [your] initial request was much broader than that included in the reply received’. Consequently, you ask for, I quote ‘[...] a second search of documents’.

You also argue that, I quote, ‘[...] [you] do not see any reason not to disclose the full excerpt of E[uropean] P[ersonnel] S[election] O[ffice]’s statistical IT tool, the only document identified, since it contains more details and data which are eligible to fall within the scope of [your] request.’

## **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.

As explained in point 1 of this decision, the statistical data concerning competitions and selections organised by the European Personnel Selection Office is stored in a dedicated informatics tool (database) ‘i:stat’. The data stored in that tool includes information going much beyond the range specified in your initial application. In order to provide you the information requested, it is necessary to extract the relevant data range from ‘i:stat’.

Nonetheless, ‘i:stat’ tool does not offer the possibility to set the search and extraction criteria to match exactly the data range specified in your initial application. Indeed, ‘i:stat’ tool offers a series of predefined search facilities and none of them allows for filtering out

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<sup>3</sup> With regard to the personal data, the European personnel Selection Office did not invoke, however, the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001.

and extracting the data of such a level of accuracy as that you are interested in. In order to compile the information matching exactly that you requested in your initial application, it would be necessary to carry out series of manipulations on the various data sets stored in the database. That, however, could not be considered as extraction by means of a routine search operations, which in this case, as mentioned above, are limited to the predefined search facilities.

In this context, I would like to point out that the question regarding the possible status of information stored in databases as a ‘document’ within the meaning of Regulation (EC) No 1049/2001 has already been subject to an assessment by the General Court, which in its ruling in *Typke* Case established that ‘[...] in the event of an application for access designed to have the Commission carry out a search of one or more of its databases using search criteria specified by the applicant, the Commission is obliged, subject to the possible application of Article 4 of Regulation No 1049/2001, to accede to that request, if the requisite search can be carried out using the search tools which it has available for the database in question’<sup>4</sup>.

With this judgement, the General Court confirmed the previous judgment in the *Dufour* Case, where it stated that: ‘[...] anything that can be extracted from a database by means of a normal or routine search may be the subject of an application for access [...]’<sup>5</sup>.

Consequently, the European Personnel Selection Office used one of the available facilities that allowed for extraction of the range that would constitute the closest match to that you asked for. As the result, the document identified by the European Personnel Selection Office was extracted.

Against this background, following your confirmatory application, the European Commission has carried out a renewed, thorough search for document(s) that would contain the information requested. Following this renewed search, I confirm that the European Commission has not identified any such documents, other than that identified at the initial stage.

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 [...]’.

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<sup>4</sup> Judgment of the General Court of 2 July 2015, *Typke v Commission*, T-214/13, EU:T:2015:448, paragraph 56.

<sup>5</sup> Judgement of the General Court of 26 October 2011 in Case T-436/09, *Dufour v European Central Bank*, (ECLI:EU:T:2011:634), paragraph 153.

Furthermore, the General Court held in Case T-468/16 (*Verein Deutsche Sprache v European Commission*) that there exists a presumption of lawfulness attached to the declaration by the institution asserting that documents do not exist<sup>6</sup>. This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence<sup>7</sup>. The Court of Justice, ruling on an appeal in Case C-440/18 P, has recently confirmed these conclusions<sup>8</sup>.

In the light of the above, given that the European Commission holds no documents containing information of the level of detail that you requested, it is not possible to handle this aspect of your confirmatory application.

The identified document contains also information, which is not mentioned in your initial application. This includes, for instance, the list of the references of 25 oldest open reserve list or information regarding flagging system to indicate candidates' status on the reserve list. This information clearly falls outside the scope of your initial application and for this reason has been redacted as such.

In the light of the above, I have to confirm the position of the European Personnel Selection Office to grant (wide) partial access to the identified document. The relevant undisclosed parts thereof contain information, as mentioned above, falling outside the scope of your application, or constitute personal data, requiring protection under the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

The detailed reasons are provide below.

## **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'.

In this context, please note that in its judgment in Case C-28/08 P (*Bavarian Lager*)<sup>9</sup>, 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 data<sup>10</sup> ('Regulation (EC) No 45/2001') becomes fully applicable.

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<sup>6</sup> Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v European Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

<sup>7</sup> Ibid.

<sup>8</sup> Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18P, EU:C:2019:77, paragraph 14.

<sup>9</sup> 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.

<sup>10</sup> 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) 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/EC<sup>11</sup> ('Regulation (EU) 2018/1725').

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'.<sup>12</sup>

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.<sup>13</sup>

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'.<sup>14</sup>

The identified document contain the unique identifier (login) of the 'i:stat' user that extracted the data included in that document. The identified is composed of a series of characters, based on the actual name and surname of that user.

The names<sup>14</sup> 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) 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.

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<sup>11</sup> Official Journal L 205 of 21.11.2018, p. 39.

<sup>12</sup> *European Commission v The Bavarian Lager* judgment quoted above, paragraph 59.

<sup>13</sup> 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.

<sup>14</sup> *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

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<sup>15</sup>. 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.

According to Article 9(1)(b) of Regulation (EU) 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 the document 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 subject concerned would be prejudiced by disclosure of the personal data reflected in the document, as there is a real and non-hypothetical risk that such public disclosure would harm the privacy and subject it 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.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

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

### **4. PARTIAL ACCESS**

(Wide) partial access has been granted to the identified document.

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<sup>15</sup> 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.

## **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,



*For the Commission*  
*Ilze JUHANSONE*  
*Secretary-General*