



EUROPEAN COMMISSION

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Slovenia

**DECISION OF THE EUROPEAN 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 2018/4227**

Dear [REDACTED],

I refer to your email of 7 September 2018, registered on the next day, 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 documents² (hereafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 2 August 2018, addressed to the European Personnel Selection Office, you requested access to the following documents:

- ‘[in relation to] open competition EPSO/AD/322/16: documents informing participating candidates about their MCQ results, where the given pre-selection Language 1 equals to [each of the 24 official EU languages] and the particular candidate has obtained less than 10 correct answers for verbal reasoning (Test a)’;
- ‘[in relation to] open competition EPSO/AD/322/16: documents informing participating candidates about their MCQ results, where the given pre-selection Language 1 equals to [each of the 24 official EU languages] and the particular candidate has obtained 10 or more correct answers for verbal reasoning (Test a)’;

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

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

- '[in relation to] open competition EPSO/AD/338/17 documents informing participating candidates about their MCQ results, where the given pre-selection Language 1 equals to [each of the 24 official EU languages] and the particular candidate has obtained less than 10 correct answers for verbal reasoning (Test a)' and;
- '[in relation to] open competition EPSO/AD/338/17 documents informing participating candidates about their MCQ results, where the given pre-selection Language 1 equals to [each of the 24 official EU languages] and the particular candidate has obtained 10 or more correct answers for verbal reasoning (Test a)'.

In its initial reply of 27 August 2018, the European Personnel Selection Office informed you that it had identified:

- 4703 individual result letters sent to candidates who participated in the multiple choice test of open competition EPSO/AD/322/16, registered in the Office's database and;
- 18050 individual result letters sent to candidates who participated in the multiple choice test of open competition EPSO/AD/338/17, registered in the Office's database.

The European Personnel Selection Office pointed out that the names, candidate numbers, first and second language choices and detailed test results constitute personal data, which had to be protected by the exception provided in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. It also considered that 'no meaningful partial access to the documents requested [was] possible without creating a disproportionate administrative burden' and that the information not falling under that exception was 'of no substantial value, as it is already in the public domain'.

In your confirmatory application, you request a review of this position. You are of the view that the European Personnel Selection Office 'has altered [your] initial request', that concerned '96 sets of documents'. You support your confirmatory application with several arguments that have been taken into account in my review, the results of which are set out hereafter.

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.

Following the confirmatory review, I wish to inform you that I confirm the initial decision of the European Personnel Selection Office to refuse access to the documents requested. This refusal is based on Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

2.1. Identification of documents

In your application, you request access to the totality of the multiple choice test result letters sent to the candidates who participated in those tests in competitions EPSO/AD/322/16 and EPSO/AD/338/17, split into 96 separate lots on the basis of, firstly, the competition to which they pertain, secondly, the language 1 choice of the candidates, and thirdly, whether they had 10 or more correct answers or less than 10 correct answers in the verbal reasoning test (test a).

In its initial reply, the European Personnel Selection Office identified two lots of such test result letters sent to the candidates who took part in the relevant tests of competitions EPSO/AD/322/16 and EPSO/AD/338/17. However, it did not group the identified documents further, based on their first language choice and the results obtained in the verbal reasoning test for each competition, as specified above.

The letters requested are stored in the database of the European Personnel Selection Office called ‘Talent’.

However, the ‘Talent’ database does not allow for searching data and/or documents based on the parameters specified by you, i.e. according to language choices and test results, and for categorising the latter in sets as requested. Instead, this database is designed to manage the progression of very large numbers of applicants through the different stages of the selection process. Its routine search operations have been designed to respond to the operational needs of the organisation of competitions, i.e. to produce data sets that are necessary for the European Personnel Selection Office and the Selection Boards to be able to carry out their work.

The format of the data requested by you is, however, not operationally useful for the European Personnel Selection Office. Moreover, a search on the basis of language choices would result in a categorisation of candidates that could be detrimental to a fair and objective selection process. For these reasons, the ‘Talent’ database was not designed to produce, upon request, such data or document sets.

As a consequence, grouping the documents into the subsets defined by you cannot be done by carrying out a routine search operation, but would require heavy manual processing.

In this context, I would like to point out that the similar question of the possible status of information stored in databases as a document within the meaning of Regulation 1049/2001 has already been subject to an assessment of the General Court, which, in its ruling in Case T-214/13, 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'.³

With this judgement, the General Court confirmed the previous judgment in the *Dufour* case, in which the Court 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'.⁴

Furthermore, I would like to bring to your attention the most recent judgement in Case C-491/15P, where the Court took the position that the routine character of an operation that determines whether information extracted from a database is a document, is determined by whether the operation has been made available to final users for general use.⁵

As detailed above, the format and categorisation of the documents requested, i.e. the latter's grouping into 96 data sets, cannot be extracted from the 'Talent' database by means of a normal routine search operation using the search tools available to the European Personnel Selection Office.

In analogy with the above-mentioned case-law on the comparable question of the qualification of information contained in a database as a document, the routine character of the search operation at stake is to be considered as the decisive factor also in the current context, i.e. with regard to the question as to whether a certain format of documents can be produced by the institution or service concerned and whether such a format consequently exists.

As the categorisation of documents as requested by you cannot be extracted by means of a routine search operation but only by heavy manual processing, I conclude that the European Commission does not hold the documents grouped into 96 data sets as requested by you.

Indeed, the search tools available in the framework of a routine search operation allow only for the extraction of a categorisation of documents pertaining respectively to each of the two competitions concerned, i.e. EPSO/AD/322/16 and EPSO/AD/338/17.

2.2. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that '[t]he 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'.

The documents requested contain the names and surnames as well as the candidate numbers and the test results of the individuals to whom these letters were addressed. Moreover, each of these documents contains a handwritten signature.

³ Judgment of 2 July 2015, *Typke v Commission*, T-214/13, EU:T:2015:448, paragraph 56.

⁴ Judgement of 22 October 2011, *Dufour v European Central Bank*, T-436/09, EU:T:2011:634, paragraph 153.

⁵ Judgment of 11 January 2017, *Typke v Commission*, C-491/15P, EU:C:2017:5, paragraph 36.

Indeed, any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁶

It follows that the 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 cumulative.⁷ 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 transfer of personal data occur.

In its 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 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'.⁸

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 data.⁹

In your confirmatory request, you do not establish the necessity of having the data in question transferred to you.

Furthermore, there are reasons to assume that the legitimate interests of the individuals concerned would be prejudiced by disclosure of the personal data reflected in the documents concerned, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

As to the handwritten signature appearing on each of the documents, which constitutes biometric data, there is a risk that its public disclosure would prejudice the legitimate interests of the person concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data contained in the documents concerned, as the need to obtain access thereto has not been substantiated, and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of this personal data.

⁶ Judgment of 20 December 2017, *Peter Nowak v Data Protection Commissioner*, C-434/16, request for a preliminary ruling, EU:T:2018:560, paragraphs 33-35.

⁷ *Idem*, paragraphs 77-78.

⁸ Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

⁹ Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

2.3. Protection of the decision-making process

Article 4(3), second subparagraph of Regulation 1049/2001 provides that '[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institutions concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

Moreover, Article 6 of Annex III of the Staff Regulations¹⁰ provides that '[t]he proceedings of the Selection Board shall be secret'. This confidentiality requirement is inextricably linked to the protection of the internal decision-making process of the Selection Boards within the meaning of Article 4(3) of Regulation 1049/2001.

In the *Le Voci* judgment, the General Court held that 'the applicant cannot validly rely on the concept of transparency in order to call into question the applicability of Article 6 of Annex III to the Staff Regulations'.¹¹

The General Court also confirmed that 'secrecy was introduced with a view to guaranteeing the independence of the Selection Boards and the objectivity of their proceedings, by protecting them from all external interference and pressures whether these come from the Community administration itself or the candidates concerned or third parties and observance of that secrecy runs counter to divulging the attitudes adopted by individual member of Selection Boards and also to revealing all the factors relating to individual or comparative assessment of candidates'.¹²

In its judgment in the *Alexandrou* case, the General Court reaffirmed that the general principle of transparency resulting from Article 15(3) of the Treaty on the Functioning of the EU and Article 42 of the Charter of Fundamental Rights could not be validly invoked in order to justify a circumvention of Article 6 of Annex III of the Staff Regulations.¹³ Indeed, neither Regulation 1049/2001 nor the Staff Regulations contain any provision expressly giving one regulation primacy over the other. Therefore, it is appropriate to ensure that each of those Regulations is applied in a manner that is compatible with the other, and that enables the consistent application of each of them.¹⁴

The documents to which you request access contain the scores obtained in the computer-based multiple choice tests by all the candidates who participated in competitions EPSO/AD/322/16 and EPSO/AD/338/17.

¹⁰ Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, Official Journal P 045 of 14.6.1962, p. 1385, with amendments. A consolidated version is published as 1962R0031-EN-01.06.2014-012.003-1.

¹¹ Judgment of 14 July 2005, *Le Voci v Council of the EU*, T-371/03, EU:T:2005:290, paragraph 124.

¹² *Ibid*, paragraph 123.

¹³ Judgment of 12 November 2015, *Alexandrou v Commission*, T-515/14 and T-516/14, EU:T:2015:844, paragraph 71.

¹⁴ *Ibid*, paragraph 69.

The test scores appearing in the result letters that are the subject of your confirmatory request reflect the Selection Board's individual assessment of every candidate's merits in the multiple choice question tests.

Moreover, the disclosure of the result letters of the entire candidate population in these competitions would also allow for a re-constitution of the candidate ranking based on merit. Such candidate ranking reflects the Selection Boards' comparative assessment of the whole candidate population tested in competitions EPSO/AD/322/16 and EPSO/AD/338/17.

The General Court¹⁵ has ruled that the comparative assessment of the candidates by the Selection Board is reflected in the marks assigned to them and that these marks are the expression of the Board's value judgment concerning each candidate.¹⁶

This comparative assessment considered as a whole is to be qualified as an opinion for internal use in the sense of Article 4(3) of Regulation 1049/2001 because this assessment of the entire candidate population is meant to be used only by the relevant Selection Board and the European Personnel Selection Office. Moreover, this assessment is inextricably linked to the proceedings of Selection Boards, which are meant to be secret in accordance with Article 6 Annex III of the Staff Regulations.

Moreover, the disclosure of the test results taken out of context and without further explanation is highly likely to result in misleading, if not inaccurate, conclusions about the decisions of the Selection Boards of the relevant competitions regarding the assessment of the candidates, but also concerning the level of difficulty of the tests.

In line with the relevant case law¹⁷, Selection Boards are not only responsible for the assessment and selection of candidates, but also exercise control over the computer-based multiple choice tests by determining their level of difficulty and by carrying out prior and subsequent quality control of the items composing the tests.

The system of delivering computer-based tests used in all competitions of the European Personnel Selection Office relies on a large 'item bank' database, which contains tens of thousands of active test questions (also called 'items'). These items, which have been developed in all 24 official EU languages and are categorised into several levels of difficulty per test type, are used in the computer-based reasoning tests of all competitions. This effectively means that in every competition, including computer-based tests, a different subset of questions taken from the same database is presented to the candidates, based on the parameters defined by the relevant Selection Board.

¹⁵ The Court of First Instance at the time of the ruling.

¹⁶ Judgment of 29 January 1998, *Affatato v Commission*, T-157/96, EU:T:1998:12, paragraph 34.

¹⁷ Judgment of 15 April 2010, *Matos Martins v Commission*, F-2/07, EU:F:2010:22, paragraphs 161, 170 and 171.

Boards determine the difficulty level of these tests by approving the so-called difficulty matrix. The matrix, which specifies what difficulty level questions should be used in the tests and in what proportions, is set by each Board depending on the specific characteristics of each competition (such as field, function group and grade).

Furthermore, Boards must check and validate the test content (for example, the subset of test items to be used in the given competition) before the tests can take place. If errors are discovered at this approval stage in advance, the erroneous items are withdrawn from the database and are not used in the tests.

Finally, the Selection Boards also exercise a subsequent systematic control of test content and quality, namely by examining candidates' complaints in the framework of the neutralisation procedure established by section 3.4.2 of the General Rules governing Open Competitions¹⁸, and, if appropriate, by neutralising questions that they consider ambiguous or erroneous.

For these reasons, the public disclosure of the test results is highly likely to result in misleading conclusions about the decisions of the Selection Boards of the relevant competitions with regard to the preparation and *ex post* control of the computer-based tests at stake.

Considering the systematic re-use of test items in subsequent competitions, the public disclosure of the full set of test results of all the candidates and the associated comparative assessment - very probably leading to inaccurate conclusions - would also involve the foreseeable risk of undue external pressure on the decision-making of Selection Boards related to fixing difficulty matrices and to subsequent test quality control in future competitions, where the same test item database will be used.

This, in turn, would lead to unfruitful discussions causing delays in the competition schedule, as well as decisions being skewed by undue external influence, thereby severely undermining the fairness and efficiency of competitions.

However, cooperation within the Selection Boards, free from outside interference, is of paramount importance for the smooth running of a competition. Any constraint at this level could severely hamper the work of the Boards, and therefore compromise the entire competition process, to the detriment of the interests of the European institutions and candidates.

Against this background, public access to the requested documents would lead to a circumvention of Article 6 of Annex III of the Staff Regulations, providing for the secrecy of the proceedings of the Selection Boards.

¹⁸ The General Rules are included as annex in each competition notice.

For these reasons, the public disclosure of the test score data contained in the documents requested would foreseeably result in serious prejudice to the objectivity of future staff selection procedures and the equality of treatment of the participating candidates. It would thus seriously undermine the future decision-making process of Selection Boards.

Consequently, I conclude that access to the test scores contained in the documents requested has to be refused on the basis of Article 4(3), second subparagraph (protection of the decision-making process) of Regulation 1049/2001, read in conjunction with Article 6 of Annex III to the Staff Regulations.

3. NO PARTIAL ACCESS

I have considered the possibility of granting partial access to the documents requested.

However, no meaningful partial access can be provided to the latter as a large part of their content is protected by the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), second subparagraph (protection of the institution's decision-making process) of Regulation 1049/2001, as set out above.

Against this background, and contrary to what you specifically asked for in your confirmatory application, it would not have been appropriate to propose to you a fair solution that would have restricted the scope of your confirmatory request on the basis of Article 6(3) of Regulation 1049/2001. Indeed, the assessment of a limited number of documents would not have resulted in the satisfaction of your request, or parts thereof, either, as any subset of the documents requested would also have fallen under the above-mentioned exceptions to the right of access.

Furthermore, you indicate in your confirmatory application that you wish to obtain access to the candidates' computer-based test scores 'in order to conduct a statistics research which will be published'. However, as illustrated in point 2.1 above, the 'Talent' database does not allow for searching data and/or documents based on the parameters specified by you, i.e. according to language choices and test results. Therefore, the European Commission would not have been able to propose, in the framework of a fair solution, to assess a smaller sample of documents that would correspond to the specific purpose of your request.

Finally, I would like to stress that, contrary to what you state in your confirmatory application, each of the 22753 documents identified by the European Personnel Selection Office would need to be individually assessed and manually redacted in order to be released publicly without containing protected information. Indeed, the European Personnel Selection Office's 'Talent' database does not provide for a 'computer assisted anonymisation of large sets of documents that were created from a single template', as however assumed by you.

Therefore, the manual redaction of this information in such a high number of documents would create an excessive administrative burden. In line with the relevant case law of the European Courts¹⁹, the European Commission is thus not obliged to provide partial access to the documents concerned.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception in Article 4(1)(b) of Regulation 1049/2001 does not need to be balanced against the overriding public interest.

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.

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the requested documents. The collection of data for the purpose of statistical research supposed to be published constitutes a private interest and can thus not be considered as providing an overriding public interest.

Nor have I been able, based on the elements at my disposal, to establish the existence of any overriding public interest in the disclosure of the documents in question. In any case, I consider that the public interest is better served in this case by ensuring the secrecy of proceedings and the decision-making process of the Selection Boards, which are indispensable for the objectivity of future staff selection procedures as well as the equality of treatment of the participating candidates, as pointed out above.

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

¹⁹ Most recent judgment of the General Court of 25 September 2018, *Psara and Others v European Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraph 127.

5. MEANS OF REDRESS

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 European Commission
Martin SELMAYR
Secretary-General