EUROPEAN COMMISSION

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Portugal

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - Gestdem 2018/4802

Dear [Name],

I refer to your email of 19 October 2018, registered on 22 October 2018, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (‘Regulation 1049/2001’).

1. SCOPE OF YOUR REQUEST


The European Commission has identified the following document as falling under the scope of your application:


Your initial application was attributed to Directorate A (‘Decision-making Process’) of the Secretariat-General of the European Commission (hereafter ‘Directorate A’), which provided its reply on 15 October 2018.

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In its reply, Directorate A refused access to the document concerned, based on the exception provided for in Article 4(3) of Regulation 1049/2001 (protection of the decision-making process).

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

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 concerned at the initial stage.

Having carried out a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I regret to inform you that I have to confirm the refusal to grant access to the document concerned. The underlying exceptions are the ones protecting international relations and the decision-making process provided for, respectively, in the third indent of Article 4(1)(a) of Regulation 1049/2001 and Article 4(3), second subparagraph, of the said Regulation.

The detailed reasons are set out below.

2.1 **Protection of international relations**

Article 4(1)(a), third indent of Regulation 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 interest.\(^3\)

The document requested forms part of the minutes of the meeting of the College of the Commissioners on 16 November 2004. The main minutes (‘ordinary minutes’) from that meeting are publically accessible through the Europa website.\(^4\) The part of the minutes to which you request access (the ‘special minutes’) was, however, not made available to the public. Only the ordinary minutes of the meetings of the European Commission are proactively published, in line with the provisions of Article 9 of the Decision of the European Commission C(2001)3714.\(^5\)

The special minutes included in document PV(2004)1679/S contain internal deliberations of the College made in the context of agenda point 12 of the ordinary minutes of the meeting of 16 November 2004. That agenda point related to the Agreement for Research

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and Development co-operation in the peaceful uses of nuclear energy between Euratom and the government of the People’s Republic of China.

Public disclosure of that document would reveal information that could have a negative impact on various ongoing interactions with the People’s Republic of China, such as for example the EU – China Comprehensive Agreement on Investment, or the ongoing EU – China discussions on the reform of the World Trade Organisation. Given the importance of these discussion in the general context of the EU – China relations, it is absolutely necessary to maintain the atmosphere of mutual trust between the partners. Public release of that document would undermine the international relations between the EU and the People’s Republic of China.

It is not possible to provide more detailed explanations without undermine the interests that the use of the invoked exception aims to protect.

In the light of the above, it is evident that there is a reasonable risk that public disclosure of the document concerned would harm the public interest protected by Article 4(1)(a), third indent of Regulation 1049/2001.

2.2 Protection of the decision-making process

Article 4(3), second subparagraph Regulation 1049/2001 provides that ‘access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution 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’.

On 16 November 2004 the European Commission adopted the Communication from the Commission to the Council concerning the conclusion of an agreement for Research and Development co-operation in the peaceful uses of nuclear energy between Euratom and the government of the People’s Republic of China. Through the Communication, the European Commission invited the Council to approve the text of the above-mentioned agreement, in view of the conclusions included in that Communication.

Indeed, following approval of the text by the Council, the agreement was finally concluded by the European Commission and representatives of the government of the People’s Republic of China on 24 April 2008.

In the light of the above, the statement included in the document concerned was made at the advanced, but not final stage of the process of concluding the Agreement in question. Furthermore, Communication COM(2004)755 was adopted by the European Commission, in line with the principle of collegiality. Consequently, the statement in question has to be considered as ‘opinion for internal use, as part of deliberations’ within the institution concerned.

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Disclosure of the document in question, containing the special minutes of the College meeting, would seriously undermine the decision-making process of the European Commission, as it would seriously reduce its ability to act as a collegiate body as provided for by Article 17 of the Treaty of the EU.

The Treaties have established the European Commission as an institution whose Members take all decisions necessary to discharge the tasks of the European Commission in a collegial way. As the Court of Justice has stated in settled case-law, the principle of collegiality is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular, that decisions should be the subject of collective deliberation and that all the members of the College of the Commissioners should bear collective responsibility at political level for all decisions adopted.

It is in the very nature of a collegial decision-making process that the deliberations remain confidential. Therefore, in order to ensure that the Members of the European Commission can, in complete independence, take positions, defend viewpoints, form and, as the case may be, change their opinion in the course of a deliberation, they must be able to have confidence that their deliberations are, and will remain, confidential.

Obviously, the conclusions of the deliberations of the College of Commissioners must be public; and they indeed are, as the (ordinary) minutes of the meetings are published on its website. But the content of the deliberations is only made public to the extent the European Commission itself finds it necessary to do so; the (ordinary) minutes sometimes contain indications on the main elements brought forward in the debate within the College, when that is considered useful for the understanding of the decision taken, but not always, and not in detail.

On the one hand, the European Commission is politically responsible for its decisions as a body. This implies that Commissioners are prevented from calling into question a decision taken by the European Commission or disclosing what is said at meetings of the European Commission, and that the European Commission has to defend as a body its decisions when they are subject of legal challenge. On the other hand, it is of paramount importance that during the collegial deliberations every Member of the European Commission can express his/her position in a free and independent way and this can only be achieved if the course of the deliberations is to remain confidential. It is therefore necessary to protect that collective deliberation by avoiding that the personal views of one or the other Member is put in the public domain, risking undermining the collegial way in which decisions are taken. This is self-evident for the case of a vote; but it is also true for other deliberations. Yet, for the functioning of the European Commission, it is essential that minutes are kept about these deliberations. To that effect, the European Commission can publish minutes on its website. The Court of Justice has stated that the European Commission can publish minutes on its website and that those minutes do not contain confidential information. On the contrary, those minutes do not contain any confidential information but rather the main elements brought forward in the debate within the College, when that is considered useful for the understanding of the decision taken, but not always, and not in detail.

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Commission has recourse to the instrument of the special minutes, which are not made available to the public.

Consequently, in order to protect the collegial nature of the decision-making process of the European Commission, access cannot be given to the special minutes. It is irrelevant whether the debate reported in specific special minutes was consensual or divided, whether the individual Members have expressed themselves in a general or specific way, or, for that matter, not at all. Indeed, access to special minutes would seriously undermine the institution's decision-making process as such, i.e. the whole system. It would not so much affect the decision-making process leading to a particular decision, but would undermine in general the collegial way in which the European Commission must, as foreseen in the Treaties, reach its decisions.

The prospect that, potentially, access could be given in the future to the special minutes of a meeting would have a deterrent effect on the Commissioners and would thus prevent them from expressing their views freely, which would as a direct consequence impoverish the debate inside the College and hence the quality of the decisions. The only alternative to prevent such an unwanted and wrong effect would be that no special minutes would be drawn anymore, which would be equally damaging for the good functioning of the European Commission.

For these reasons, the European Commission considers that it is entitled to presume that, as a matter of principle, the disclosure of the special minutes of College meetings would seriously undermine its decision-making process and the principle of collegiality.

Having regard to the above, I consider that the use of the exception under Article 4(3), second subparagraph, of Regulation 1049/2001 is justified concerning document PV(2004)1679/S and that access thereto must be refused on that basis.

3. **NO PARTIAL ACCESS**

I have examined the possibility of granting partial access to the document concerned, in accordance with Article 4(6) of Regulation 1049/2001.

However, no meaningful partial access is possible, given that the entire content of the document concerned is covered in its entirety by the exceptions provided for in Article 4(1)(a), third indent, of Regulation 1049/2001 and Article 4(3), second subparagraph, of that Regulation.

4. **NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(1)(a) of Regulation 1049/2001 does not need to be balanced against any possible overriding public interest in disclosure.

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.
I note that you do not put forward any elements to demonstrate the existence of an overriding public interest in disclosure of the documents requested.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the independence of the Commission's decision-making process grounded in Article 4(3) of Regulation 1049/2001.

The fact that the document requested was not drafted in the framework of the legislative activities of the European Commission, for which the Court of Justice has acknowledged the existence of wider openness, provides further support to this conclusion.

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

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CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

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