



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 applications for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/7132, 2019/7134,
2019/7136, 2019/7137, 2019/7138**

Dear Mr Hillebrandt,

I refer to your email of 12 February 2020, registered on 13 February 2020, 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 (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial applications of 9 December 2020, addressed to the Secretariat-General of the European Commission, you requested access to ‘all replies to confirmatory applications based on Regulation (EC) No 1049/2001 adopted by the European Commission in 2014³, 2015⁴, 2016⁵, 2017⁶ and 2018⁷’.

¹ OJ L 345 29.12.2001, p. 94.

² OJ L 145 31.5.2001, p. 43.

³ Registered under reference number GESTDEM 2019/7138.

⁴ Registered under reference number GESTDEM 2019/7137.

⁵ Registered under reference number GESTDEM 2019/7136.

⁶ Registered under reference number GESTDEM 2019/7134.

⁷ Registered under reference number GESTDEM 2019/7132.

The European Commission proceeded to estimate the workload associated with the handling of the five initial applications introduced by you on the same day, concerning the same type of documents, i.e., decisions on confirmatory applications adopted by the European Commission on the basis of Regulation (EC) No 1049/2001.

As indicated in the annex to the report from the European Commission on the application in 2018 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents⁸, the European Commission provided the following numbers of replies to confirmatory requests based on Regulation (EC) No 1049/2001 in the years concerned by your applications:

- 272 in 2014;
- 230 in 2015;
- 220 in 2016;
- 259 in 2017;
- and 288 in 2018.

Based on the above numbers, there are at least 1.269 documents falling under the scope of your five initial applications, also considering that decisions on confirmatory applications enclose a varying number of annexes. These documents form part of these decisions and full or partial access was granted to them. Due to the very high volume of the documents under review⁹, the analysis of the documents falling under your above-mentioned applications cannot be completed within the normal time limits set out in Article 7 of Regulation (EC) No 1049/2001.

According to the Secretariat-General's preliminary estimates and based on past experience with requests concerning the same type of documents, the workload for dealing with your initial applications would require an excessive number of working days, estimated in at least 3.800 working days, covering the following steps:

- identification, gathering and quick screening of the documents falling under your initial requests;
- assessment of the content of the documents;
- performing possible redactions of the relevant parts falling under exceptions of Regulation (EC) No 1049/2001, in particular based on the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual);
- preparation of the draft replies;
- preparation of the e-signatory of the files;
- formal approval of the draft decisions by the hierarchy of the Secretariat-General;
- and

⁸ COM(2019) 356 final.

⁹ As confirmed by the General Court in its Judgment of 10 December 2010 in Case T-494/08, *Ryanair v European Commission*, the volume of documents concerned under several applications for access to documents can be considered together, where these applications were made to the European Commission almost simultaneously, from the same applicant and covering cases which were connected.

- final check of the documents to be released and dispatch of the replies.

These estimates took also into account other applications for access to documents¹⁰ and other tasks that the European Commission staff concerned would have to deal with during the period of handling your initial applications.

The European Commission therefore concluded that the workload relating to the disclosure of the documents requested under your initial applications would be disproportionate as compared to the objectives set by the applications for access to these documents, and that the corresponding resources could not be allocated to handle your requests, so as to safeguard the interests of good administration and to ensure the proper handling of applications originating from other applicants.

1.1. Fair solution in accordance with article 6(3) of Regulation (EC) No 1049/2001

As stated by the EU Courts, the European Commission must respect the principle of proportionality and ensure that the interest of the applicant for access is balanced against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration.

In its letter of 23 December 2019, the Secretariat-General described in detail the actions needed in order to handle these requests and concluded that the handling of your five simultaneous requests could not be completed within the normal time limits set out in Article 7 of Regulation (EC) No 1049/2001. It underlined that, in accordance with the case law of the EU Courts, a fair solution can only concern the content or the number of documents applied for, not the deadline for replying¹¹. Based on Article 6(3) of Regulation (EC) No 1049/2001, it asked you to specify your specific interest in the documents requested¹², and whether you could narrow down the scope of your request, to reduce it to a more manageable number, namely to deal with two documents falling within the scope of each of your requests, i.e., per year concerned, or, in the alternative, to deal with an overall number of ten documents falling within the scope of your request as limited to one specific year.

In your reply of 28 December 2019, you counter-proposed to limit the scope of your requests to the confirmatory decisions adopted in the year 2018, and to exclude their annexes from the scope of your request.

¹⁰ Including similar initial applications for access to confirmatory decisions adopted by the European Commission.

¹¹ Judgment of the Court of Justice of 2 October 2014, *Guido Strack v European Commission*, C-127/13 (hereafter '*Guido Strack v European Commission*'), EU:C:2014:2250, paragraphs 26-28.

¹² Ibid, paragraph 28; Judgment of the General Court of 22 May 2012, *EnBW Energie Baden-Württemberg v European Commission*, T-344/08, EU:T:2012:242, paragraph 105.

In its letter of 7 January 2020, the Secretariat-General informed you that, notwithstanding the substantial reduction of the number of requested documents, the solution you proposed would still require the treatment of 288 documents, the individual assessment of which cannot be completed within the normal time limits set out in Article 7 of Regulation (EC) No 1049/2001 without entailing a disproportionate administrative burden for the European Commission. In this light, and taking into consideration your proposed solution and your stated purpose of academic research, the European Commission proposed to deal with an increased overall number of 30 documents falling within the scope of your requests, namely 30 confirmatory decisions, excluding their annexes, adopted in 2018. In order to provide you with a representative sample of confirmatory decisions for the stated purpose of your research into the European Commission's implementation of Regulation (EC) No 1049/2001, the European Commission further proposed to deal with such overall number of 30 documents as limited to one specific month, for instance the last month of the year 2018.

In your reply of 13 January 2020, you stated you cannot agree with the further solution proposed by the Secretariat-General. Unfortunately, therefore, despite its efforts, the Secretariat-General has not been able to agree on a fair solution as regards the handling of your above-mentioned initial applications.

Taking into account the time that has elapsed since the registration of your initial applications and with a view to safeguarding the interests of good administration, the Secretariat-General consequently saw itself obliged to balance your possible interest in access against the workload resulting from the processing of your applications. This is in line with the case-law of the EU Courts¹³. The Secretariat-General has come to the conclusion that handling the full scope of your five initial applications, or of your proposal of 28 December 2019, would involve an excessive administrative burden that would be disproportionate with your possible interest in obtaining the requested documents.

Therefore, the Secretariat-General has proceeded to the unilateral restriction of the scope of your initial applications registered under GESTDEM 2019/7132, 2019/7134, 2019/7136, 2019/7137 and 2019/7138, so as to bring it down to a more manageable number of documents. It has decided, per the Secretariat-General's second fair solution proposal of 7 January 2020, to handle 30 documents covered by your requests, namely the 30 confirmatory decisions, excluding their annexes, which were last adopted in the year 2018.

The Secretariat-General informed you that:

- wide partial access is granted to documents 1, 3-12, and 14-30, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- partial access is granted to documents 2 and 13, subject to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual), and of commercially sensitive information in accordance with the first indent of Article 4(2) (protection of commercial interests of a natural or legal person) of Regulation (EC) No 1049/2001.

¹³ *Guido Strack v European Commission*, C-127/13, EU:C:2014:2250, paragraphs 26-28.

These documents, including their detailed references, are listed in annex I of the initial reply dated 30 January 2020 (Ares(2020)587318).

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 a preliminary remark, I would like to clarify the scope of this confirmatory decision.

Please note that pursuant to Article 7, paragraph 2 of Regulation (EC) No 1049/2001, the purpose of a confirmatory application is to review the initial position of the Directorate-General in question.

In your five initial applications, you indicated expressly that you requested ‘all replies to confirmatory applications based on Regulation (EC) No 1049/2001 adopted by the European Commission in 2014, 2015, 2016, 2017 and 2018.’ In your confirmatory application you specify that you ‘accept the Commission’s decision to limit, in certain places, the access to 30 documents selected for consideration on various grounds under Article 4 of Regulation (EC) No 1049/2001.’ Therefore, I conclude that you do not contest the partial access to 30 identified documents at the initial stage.

Furthermore, you underline that ‘the Council already for many years routinely makes its confirmatory application decisions directly available on its register and with only few exceptions’ and subsequently, you request the European Commission to ‘revise its practice of proactive publication of confirmatory application decisions by making, such decisions, future and past, directly downloadable, or at the very minimum visible, through its online register at the earliest possible moment, as per Regulation 1049/2001/EC, Article 11 and 12.’

I take note of these comments about the policy of proactive publication concerning two separate EU institutions. However, it must be recalled that Regulation (EC) No 1049/2001 does not directly link Article 11 thereof to the right to access to documents under Article 2(1). This issue cannot therefore be taken into account in the framework of this confirmatory decision.

Finally, you state that your confirmatory request ‘pertains exclusively to the Commission’s argumentation related to the supposed disproportionate administrative burden of my requests, as well as its handling of the search for fair solution.’

Therefore, the review performed by the Secretariat-General at confirmatory stage will focus only on the assessment of the way the unilateral restriction was performed at initial stage.

Notwithstanding the above, I regret to inform you that I have to confirm the position of the Secretariat-General of the European Commission, insofar as the unilateral restriction of the scope of your initial application is concerned.

2.1. Unilateral restriction of the scope of the initial application

In your confirmatory application, you contest the position of the Secretariat-General, as regard the unilateral restriction of the scope of your (initial) applications.

In your confirmatory application, you underline the fact that the workload could be divided among 'the separate case handlers who can work simultaneously on my requests'. Although your requests were addressed only to the Secretariat-General, they form wide-scope requests. Against this background, I would like to clarify the circumstances in which the Secretariat-General restricted the scope of your initial requests.

The Secretariat-General handled in the same period of time 79 confirmatory applications including 13 newly registered confirmatory applications. At the time of your requests, the Secretariat-General was processing 16 initial requests for access to documents, among others five requests for access to documents were from you.

The estimated number of documents identified by the Secretariat-General as falling within the scope of these 16 initial requests and 79 confirmatory applications was more than 1.600 documents, out of which 1.269 documents were falling only under your five requests for access to documents.

In order to treat your requests, and that of other applicants, the Secretariat-General would have to carry out a certain number of tasks listed below:

- search for documents falling under requests for access to documents;
- retrieval and establishment of a complete list of the documents falling under the scope of your requests;
- preliminary assessment of the content of the documents in light of the exceptions of Article 4 of Regulation EC (No) 1049/2001;
- assessment of the further procedural steps to undertake, for example whether third party consultations should be made;
- (possibly) third-party consultations under Article 4(4) of Regulation (EC) No 1049/2001 and (possibly) a further dialogue with the third party originators of documents falling within the scope of your requests;
- final assessment of the documents in light of the comments received, including of the possibility of granting (partial) access;
- redactions of the relevant parts falling under exceptions of Regulation EC (No) 1049/2001;
- preparation of the draft replies;
- (possible) consultation of the Legal Service;
- finalisation of the replies at administrative level and formal approvals of the draft decisions;
- final check of the documents to be (partially) released (if applicable) (scanning of the redacted versions, administrative treatment) and dispatch of the replies.

The total number of documents corresponding to the initial scope of all the requests addressed to the Secretariat-General within the period of your initial requests for access to documents (December 2019) amounts to more than 1.600. According to the preliminary estimates based on past experience, such assessment (which would involve the tasks listed above) would require the workload corresponding to more than 4.800 working days (out of which 3.800 working days only for your five requests for access).

Notwithstanding the substantial reduction of the number of requested documents you proposed, in particular 288 confirmatory decisions adopted in 2018, the individual assessment of which cannot be completed within the normal time limits set out in Article 7 of Regulation (EC) No 1049/2001 without entailing a disproportionate administrative burden for the European Commission. It would normally require the workload corresponding to more than 860 working days.

It needs to be underlined that these estimates also take into account the fact that the staff concerned in the Secretariat-General would have to deal with other tasks and applications in parallel with the handling these initial applications of yours and with other applications received by other applicants.

I would like to point out that the beneficiaries under Regulation (EC) No 1049/2001 are ‘any citizen of the Union, and any natural or legal person’, as specified in Article 2 of that regulation. Simultaneous requests for access to documents addressed to a specific institution neither correspond to the conception ‘an application for access to a document’ as stipulated in Article 7(1) of Regulation (EC) No 1049/2001 nor can they be handled under the deadlines and conditions stipulated in that regulation¹⁴. They do not only create an extremely heavy workload for several staff members of the Secretariat-General, but they also cause a serious perturbation in its functioning.

Any public administration with limited resources has the obligation to safeguard the interests of good administration and to ensure the proper handling of confirmatory applications originating from other applicants. This has been repeatedly acknowledged by the Court of Justice. In the case at hand, it flows from the principle of proportionality that processing this and the other requests simultaneously received by the European Commission would involve an inappropriate administrative burden. The ‘self explanatory’ interest you have in receiving the requested documents has to be balanced against the workload resulting from the processing of these and your applications for access in order to safeguard the interests of good administration¹⁵.

¹⁴ In its judgment *Ryanair v European Commission*, the General Court recognised the principle that the volume of documents concerned under several applications for access to documents can be considered together, where these applications were made to the European Commission almost simultaneously, from the same applicant and covering cases which were connected. Please see Judgment of the General Court of 10 December 2010, *Ryanair v European Commission*, T-494/08, EU:T:2010:511, paragraphs 34 and 37.

¹⁵ Judgments of the Court of Justice of 6 December 2001, *Council v Hautala*, C- 353/99 P, EU:C:2001:661, paragraph 30, and *Guido Strack v European Commission*, cited above, paragraph 27.

In this particular case, the volume of your requests, their wide scope and their simultaneous introduction created an administrative burden which was particularly heavy and exceeded the limits of what may reasonably be required.

The Court of Justice recognised in its judgment in *Guido Strack v European Commission*¹⁶ that in case of wide-scope requests (requests that involve a very long document or to a very large number of documents) ‘institutions may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an inappropriate administrative burden, balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration’. This practice was also recognised by the Court in its judgment in *EnBW Energie Baden-Württemberg v European Commission*¹⁷.

Notwithstanding the fact that you were not obliged to provide any reasons for your request, you did provide a justification in saying that ‘the purpose of the academic study is the systematic study of Commission responses at the confirmatory application stage’. This statement does explain your particular personal interest in the requested documents.

Moreover, you contest the fact that the Secretariat-General did not engage more with you with the view of agreeing a fair solution with you. In the case of a wide-scope application, the institution has to adopt a final decision within the time limits laid down in Regulation (EC) 1049/2001. ‘Although, in such a case, Article 6(3) allows the institution concerned to find a fair solution with the applicant seeking access to documents in its possession, that solution can concern only the content or the number of documents applied for’, but not the deadlines for replying¹⁸.

On 13 January 2020, when you replied to the fair solution proposal of the Secretariat-General, the remaining time limit to reply to your initial applications was 13 working days. Striving to provide you with a reply respecting the legal time limits imposed by Regulation (EC) No 1049/2001, the Secretariat-General proceeded to the specific and individual examination of the number of documents it could reasonably handle in the remaining time, namely the 30 confirmatory decisions, which were last adopted in the year 2018. This was particularly possible due to a huge effort of the responsible desk officer handling your initial requests and taking into account the nature of the documents requested, namely confirmatory decisions, and the fact that you agreed to exclude their annexes from the scope of your request.

Regarding your intention to challenge its unilateral solution, please note that given the context described above, I consider that the unilateral restriction of the scope of your requests was justified.

¹⁶ *Guido Strack v European Commission*, cited above, paragraphs 26-28.

¹⁷ Judgment of the General Court of 22 May 2012, *EnBW Energie Baden-Württemberg v European Commission*, T-344/08 P, EU:T:2012:242, paragraph 105.

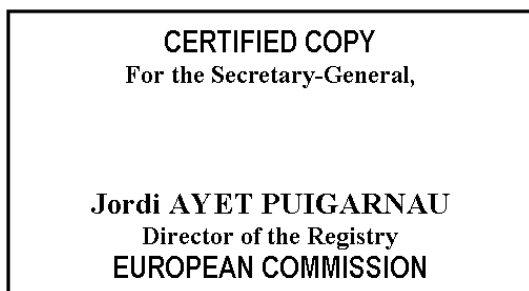
¹⁸ *Guido Strack v European Commission*, cited above, paragraph 26.

Consequently, I conclude that the decision of the Secretariat-General to unilaterally restrict the scope of your initial applications was in line with the principle of proportionality and consistent with the applicable case law of the EU Courts.

3. 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