



## EUROPEAN COMMISSION

Brussels, 1.2.2019  
C(2019) 887 final

OUT OF SCOPE

Czech Republic

**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 application for access to documents under  
Regulation (EC) No 1049/2001 - GestDem 2018/4886**

Dear [REDACTED],

I refer to your e-mail of 4 November 2018, registered on 6 November 2018, 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 documents<sup>2</sup>.

I apologise for the delay in the handling of your application.

**1. SCOPE OF YOUR REQUEST**

In your initial application of 19 September 2018, registered under the reference number GestDem 2018/4886 and dealt with by the Directorate-General for Regional and Urban Policy, you requested access to ‘the record, including detailed minutes, of the meeting between Commissioner Crețu with the Czech Prime Minister Andrej Babiš which took place on Thursday 6 September 2018 in Prague, including the list of all participating persons at that meeting’.

The Directorate-General for Regional and Urban Policy identified the following document as falling partially within the scope of your request: ‘Commissioner Crețu visit to the Czech Republic, 6 September 2018’, registered under the reference number Ares(2018)5061992.

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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.

In its initial reply, the Directorate-General for Regional and Urban Policy fully refused access to this document on the grounds of the protection of the decision-making process (Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001). As regards your request for ‘the list of all participating persons at [the meeting]’, it informed you that the European Commission does not hold any document that would correspond with such a description.

In your confirmatory application, you requested a review of the refusal to disclose the document identified under your application and you put forward a series of arguments in support of your request. These have been taken into account in the assessment, the results of which are detailed below.

On the basis of the information provided in your confirmatory application, I understand that you do not contest the position of the Directorate-General for Regional and Urban Policy concerning the above-mentioned list. Consequently, the scope of this decision is limited to the document with the reference number Ares(2018)5061992.

## **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 relevant Directorate-General at the initial stage.

Following this review, I can inform you that partial access is granted to the above-mentioned document. Please find it enclosed.

The undisclosed parts of the document warrant protection under the exceptions to the right of public access provided for in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 and Article 4(1)(b) of the same Regulation, concerning the protection of the decision-making process and the protection of privacy and the integrity of the individual, respectively. You may find detailed explanations in sections 2.1 and 2.2 below.

Please also note that certain parts of the document fall outside the scope of your application, as they do not concern the meeting between Commissioner Crețu and Prime Minister Babiš. These parts have been redacted accordingly.

### **2.1. Protection of the decision-making process**

Article 4(3) 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.

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’.

In your confirmatory application, you underline that the refusal of the document identified in your request ‘is in breach of [Regulation (EC) No 1049/2001] and the general principles of EU law’ and you put forward a number of arguments in support of your position. These arguments can be summarised as follows:

First, I understand, on the basis of the information provided in your request, that you contest the applicability of the exception laid down in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 to the document requested.<sup>3</sup> You argue that the refusal was not justified as the decision-making process of the European Commission was closed on 2 May 2018, when it adopted its proposal for the post-2020 Multiannual Financial Framework. In your view, the document in question could not be withheld on the basis of Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001, as the deliberations did not take place ‘within the institution’.<sup>4</sup>

In your confirmatory application, you also argue that the initial reply is justified ‘in a general and abstract way without specifying how the disclosure of [the document requested] would concretely and effectively undermine the [negotiation process on the future Multiannual Financial Framework]’. Moreover, in your opinion, the initial reply does not contain ‘any tangible element which would allow the conclusion to be drawn that that risk that the decision-making process would be undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical’.<sup>5</sup>

Second, you argue that the European Commission is in breach of the general principles of European Union law, notably the ‘the principle of openness and transparency’. I address this issue together with your related arguments in section 3 below.

The document identified as matching partially the criteria of your application is an e-mail sent by a member of the Cabinet of Commissioner Crețu to staff members of the European Commission. The relevant parts of this e-mail contain information on the meeting between Commissioner Crețu and Prime Minister Babiš held on 6 September 2018, which focused on the ongoing negotiations on the future Multiannual Financial Framework.

At the outset, I would like to provide some explanations on the above-mentioned negotiations.

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<sup>3</sup> Pages 2 and 3 of the confirmatory application.

<sup>4</sup> Ibid, p. 3 and 4.

<sup>5</sup> Ibid, p. 1 and 2.

In line with Article 312 of the Treaty on the Functioning of the European Union, the Multiannual Financial Framework is adopted through a special legislative procedure, with the Council of the European Union acting unanimously on a proposal of the European Commission, after obtaining the consent of the European Parliament by a majority of its component members.

The European Commission's legislative package for a post-2020 Multiannual Financial Framework includes: i) a proposal for a Council Regulation laying down the Multiannual Financial Framework for the years 2021 to 2027<sup>6</sup>, and ii) a proposal for an Interinstitutional Agreement between the European Parliament, the Council and the Commission on budgetary discipline, cooperation in budgetary matters and on sound financial management<sup>7</sup>.

While the European Commission published the above-mentioned package of proposals on 2 May 2018, the file is currently subject to discussions within the European Parliament and the Council of the European Union. Moreover, the European Council had a first substantial exchange of views on this matter in December 2018. Please note that the European Commission is a relevant actor during the negotiation process and participates in the ongoing discussions on the future Multiannual Financial Framework.

I would like to refer to Article 312, paragraph 5, of the Treaty on the Functioning of the European Union, which provides that '[t]hroughout the procedure leading to the adoption of the financial framework, the European Parliament, the Council and the European Commission shall take any measure necessary to facilitate its adoption'.

Consequently, the decision-making process concerned cannot be considered as finalised, as the discussions on the proposed future Multiannual Financial Framework are fully ongoing and a final decision has not yet been taken. Given that the subject matter of the meeting between Commissioner Crețu and Prime Minister Babiš concerns these negotiations, I consider that Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 applies to the document identified in your request.

Having regard to the ongoing nature of the decision-making process in question, I am of the view that public access to the relevant undisclosed parts of the document would seriously undermine the decision-making process of the European Commission and the related interinstitutional negotiations for the reasons set out below.

As explained previously, the document that you seek to obtain is a note prepared by a staff member of the European Commission following the meeting between Commissioner Crețu and Prime Minister Babiš that took place on 6 September 2018. The document in question was drawn up for internal use only and includes sensitive information relating to the ongoing negotiations on the post-2020 Multiannual Financial Framework.

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<sup>6</sup> COM(2018)322 final.

<sup>7</sup> COM(2018)323.

The public release of the undisclosed parts of this document would reveal preliminary reflections that the European Commission collects in order to identify room for flexibility and to prepare its strategy in the negotiation and different policy options in relation to the future Multiannual Financial Framework.

It is worth noting that the undisclosed parts of the document requested refer to preliminary views expressed by a Prime Minister and a Member of the European Commission in a direct conversation on specific issues that the Member State concerned and the European Commission have to negotiate at the level of the Council. Their disclosure at this stage of the decision-making process is likely to prevent the European Commission from receiving such sensitive information in confidence. It would also put in the public domain information directly relevant for defining the European Commission's strategy, which would seriously undermine its position towards the other EU institutions in the context of the decision-making process on the adoption of the post-2020 Multiannual Financial Framework by negatively affecting the ongoing discussions.

As mentioned above, the Multiannual Financial Framework is a sensitive matter that requires unanimity in the Council and a majority in the European Parliament for it to be adopted. The disclosure of the withheld parts of the document could affect the institutions' ability to find a compromise in the ongoing negotiations and to reach the required institutional consensus. It could also potentially result in the content of this note being misunderstood or misused, thereby impairing the ongoing decision-making procedure.

Consequently, there is a reasonably foreseeable and not purely hypothetical risk that the public disclosure of the preliminary positions discussed at the meeting would bring serious harm to the relevant decision-making process.

In light of the above, I consider that the relevant undisclosed parts of the document identified in your request need to be protected under the exception laid down in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 and that access thereto must be refused on that basis.

## **2.2. Protection of privacy and integrity of the individual**

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

The applicable legislation in this field is 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/EC<sup>8</sup>.

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<sup>8</sup> Official Journal L 205 of 21.11.2018, p. 39.

The document that you seek to obtain contains personal data, in particular the name and surname of a member of the European Commission staff who does not hold any senior management position. Indeed, Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.<sup>9</sup>

In its judgment in case C-28/08 P (*Bavarian Lager*)<sup>10</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.<sup>11</sup>

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.

According to Article 9(1)(b) of Regulation (EU) No 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established 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 weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. 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, please note that there are reasons to assume that the legitimate interests of the data subject concerned would be prejudiced by the disclosure

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<sup>9</sup> Judgment of 20 December 2017, *Peter Novak v Data Protection Commissioner*, C-434/16, request for a preliminary ruling, EU:T:2018:560, paragraphs 33-35.

<sup>10</sup> Judgment of 29 June 2010, *Commission v the Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378.

<sup>11</sup> Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation (EU) No 2018/1725.

of the personal data reflected in the document requested, as there is a real and non-hypothetical risk that such public disclosure would harm the privacy of the individual and subject the individual to unsolicited external contacts.

Consequently, I must conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data included in the document that you seek to obtain, 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 individual concerned would not be prejudiced by the disclosure of the personal data.

### **3. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered whether partial access could be granted to the document identified in your request.

As stated above, partial access is herewith granted to the document that you seek to obtain.

With regard to the remaining parts of the document, please note that further partial access to these parts cannot be granted as this would harm the decision-making process referred to in point 2.1 of this decision. Consequently, I consider that no meaningful further partial access is possible without undermining the interests protected under Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

### **4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

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 argue, in essence, that the European Commission is in breach of the general principles of openness and transparency. You refer to several Court rulings, including the *ClientEarth* case, in which the Court held that ‘transparency ensures the credibility of that institution’s action in the minds of citizens and concerned organisations and thus specifically contributes to ensuring that that institution acts in a fully independent manner and exclusively in the general interest’<sup>12</sup>.

You also refer to the *De Capitani* case<sup>13</sup>, in which the General Court stated that ‘[i]t is precisely openness in the legislative procedure that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated’.

Please note that, contrary to the above-mentioned cases, the document that you seek to obtain does not form part of the ‘basis for the legislative action’ of the European Union<sup>14</sup>

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<sup>12</sup> Judgment of 4 September 2018, *ClientEarth v European Commission*, C-57/16 P, EU:C:2018:660, paragraph 104.

<sup>13</sup> Judgment of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15, EU:T:2018:167, paragraph 78.

<sup>14</sup> See, with that regard, C-57/16 P, *ClientEarth v European Commission* (cited above), paragraph 91.

and cannot be considered as a document drawn up as ‘part of the legislative process’ concerned<sup>15</sup>. As mentioned above, the note was drawn up for internal use only and it solely reflects the author’s interpretation of the interventions made during the meeting.

In addition, I consider that a general reference to the ‘principle of openness and transparency’ is not sufficient to demonstrate an overriding public interest in disclosure in this case.<sup>16</sup> Whilst I understand that there is a public interest in the transparency of relations between Members of the Commission and representatives of Member States, this public interest does not, in my view, outweigh the need to protect the above-mentioned decision-making process.

I would like to refer to the judgment of the Court of Justice in the *Strack* case<sup>17</sup>, where the Court ruled that, in order to establish the existence of an overriding public interest in transparency, it is not sufficient merely to rely on that principle. The applicant has to show why in the specific situation the principle of transparency is especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure.<sup>18</sup>

In these circumstances, I consider that the public interest is better served by protecting the ongoing decision-making process, in accordance with Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

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

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<sup>15</sup> See, with that regard, T-540/15, *Emilio De Capitani v European Parliament* (cited above), paragraph 75.

<sup>16</sup> See, to that effect, Judgment of 16 July 2015, *ClientEarth v European Commission*, C-612/13 P, EU:C:2015:486, paragraphs 91 and 93.

<sup>17</sup> Judgment 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 128.

<sup>18</sup> *Ibid*, paragraph 129.



## 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 European Commission*  
*Martin SELMAYR*  
*Secretary-General*

Enclosure: (1)