



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 application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/6916**

Dear [REDACTED],

I refer to your email of 12 February 2019, registered on the same 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 (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 12 December 2018, addressed to the European Personnel Selection Office, you requested access to the following documents in relation to the:

- ‘open competition EPSO/AD/322/16: documents informing participating candidates about their [multiple choice questions] results’;
- ‘open competition EPSO/AD/338/17 documents informing participating candidates about their [multiple choice questions] results’ and;
- ‘open competition EPSO/AD/303/15 documents informing participating candidates about their [multiple choice questions] results’.

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

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

In its initial reply of 14 January 2019, 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;
- 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 and;
- 4471 individual result letters sent to candidates who participated in the multiple choice test of open competition EPSO/AD/303/15, registered in the Office's database.

The European Personnel Selection Office pointed out in their reply that you had already requested the same sets of documents relating to open competitions EPSO/AD/322/16 and EPSO/AD/338/17 in your request for access to documents registered under reference GESTDEM 2018/4227. It outlined the conclusions of the assessment carried out by the European Commission in the handling of the above-mentioned request both at initial and at confirmatory level and referred you to these decisions.

Analysing the documents requested relating to open competition EPSO/AD/303/15, the European Personnel Selection Office considered that they are of the exact same nature as those requested for open competitions EPSO/AD/322/16 and EPSO/AD/338/17, and that the same reasoning applies, *mutatis mutandis*, to these sets of documents. It refused access to the requested documents based on 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 decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You are of the view that the documents 'can be anonymised in automated fashion', they do not contain opinions for internal use and that there is a public interest in disclosure. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

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.

In the context of the review, I note that you do not put forward any change in the legal or factual situation that has taken place since the refusal of the European Commission to grant access to the requested documents relating to open competitions EPSO/AD/322/16 and EPSO/AD/338/17. This refusal, which concerned your request registered under reference GESTDEM 2018/4227, was explained in detail in the confirmatory decision

replying to that request. I have examined whether there are any new circumstances and concluded that the legal and factual circumstances justifying that refusal have not changed and that the earlier refusal to grant access remains justified in the light of the current legal or factual situation. Consequently, I refer you to the Decision of the European Commission C(2018)8803 and to the conclusion contained therein that access to the documents relating to open competitions EPSO/AD/322/16 and EPSO/AD/338/17 cannot be granted, based on the exception of Article 4(1)(b) (protecting privacy and the integrity of the individual) and Article 4(3), second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

As to the documents relating to the open competition EPSO/AD/303/15, I regret to inform you that I have to confirm the initial decision of the European Personnel Selection Office to refuse access to the documents requested, based on 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 decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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'.

In its judgment in Case C-28/08 P (*Bavarian Lager*)³, the Court of Justice ruled that when a request 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 data⁴ (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, 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/EC⁵ (hereafter '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.

³ 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.

⁴ Official Journal L 8 of 12.1.2001, p. 1.

⁵ Official Journal L 205 of 21.11.2018, p. 39.

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’.⁶

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

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’.⁷

The document sets you requested contain personal data such as the first names and surnames of candidates, their candidate number, their choice of test languages and their individual results. Moreover, it contains a handwritten signature.

The names⁸ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) 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.

In Case C-615/13 P (*ClientEarth*), 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 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 the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to

⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁷ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁸ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

⁹ 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.

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 state that 'the nature of the requested document is such that they can be anonymised in automated fashion'.

The multiple choice test result letters sent to the candidates who participated in those tests in competition EPSO/AD/303/15, which are stored in the database of the European Personnel Selection Office called 'Talent'. 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. It was not designed to extract certain sets of data (breakdown of test results, aggregate mark, test language etc), while withholding others (name of candidate, candidate number). Thus, the automated anonymisation of the letters is not possible.

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'.

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'.

Furthermore, I would like to bring to your attention the most recent judgement in Case C-491/15 P, 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.

As detailed above, an anonymised version of the letters 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, meaning that each of the 4471 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. 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 Courts¹⁰, the European Commission is thus not obliged to provide partial access to the documents concerned.

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 subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, 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 in all document sets, which constitute biometric data, there is a risk that their disclosure would prejudice the legitimate interest of the person concerned.

Consequently, I 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 documents relating to the open competition EPSO/AD/303/15, 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 the disclosure of the personal data concerned.

2.2. 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 Regulations¹¹ 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.

¹⁰ 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, paragraphs 126 and 127.

¹¹ 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.

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’.¹²

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’.¹³

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.¹⁴ 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.¹⁵

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 competition EPSO/AD/303/15.

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.

The General Court¹⁶ 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.¹⁷

This assessment is to be qualified as an opinion for internal use in the sense of Article 4(3) of Regulation 1049/2001 because it 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.

¹² Judgment of the General Court of 14 July 2005, *Le Voci v Council of the EU*, T-371/03, EU:T:2005:290, paragraph 124.

¹³ *Ibid*, paragraph 123.

¹⁴ Judgment of the General Court of 12 November 2015, *Alexandrou v Commission*, Joined Cases T-515/14 and T-516/14, EU:T:2015:844, paragraph 71.

¹⁵ *Ibid*, paragraph 69.

¹⁶ The Court of First Instance at the time of the ruling.

¹⁷ Judgment of the General Court of 29 January 1998, *Affatato v Commission*, T-157/96, EU:T:1998:12, paragraph 34.

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 law¹⁸, 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.

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).

For these reasons, the public disclosure of the test results 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.

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.

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

¹⁸ Judgment of the Civil Service Tribunal of 15 April 2010, *Matos Martins v Commission*, F-2/07, EU:F:2010:22, paragraphs 161, 170 and 171.

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 relating to the open competition EPSO/AD/303/15 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. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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

The exception laid down in Article 4(3) second subparagraph 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 state that you suspect a language bias in the multiple choice questions prompted by the choice of language 1, especially in the case of the verbal reasoning test, which you want to demonstrate by performing a statistical analysis of the data in these documents. You claim that there is an overriding public interest, as well as the candidates' interest, to show whether the testing was indeed fair.

You mention that the testing methodology needs to be open to public scrutiny to ensure fairness and equity. In this context, please note, that general considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, prevailing over the reasons justifying the refusal to disclose the documents in question.¹⁹ In addition, I consider that the collection of data for the purpose of statistical research 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 Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the fact that the means of redress that are available against this decision that is, judicial proceedings and complaints to the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union, are limited in so far as the legal and factual circumstances have not changed since the reply of the European Commission to your earlier request registered under reference GESTDEM 2018/4227 relating to open competitions EPSO/AD/322/16 and EPSO/AD/338/17.

The means of redress available against the decision regarding documents relating to the open competition EPSO/AD/303/15 are judicial proceedings and complaints to 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
Martin SELMAYR
Secretary-General*