



EUROPEAN COMMISSION

Brussels, 15.4.2019  
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Belgium

**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 2018/6000**

Dear [REDACTED],

I refer to your letter of 9 February 2019, registered on 11 February 2019, 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<sup>2</sup> (hereafter ‘Regulation (EC) No 1049/2001’).

**1. SCOPE OF YOUR REQUEST**

In your initial application of 13 November 2018, addressed to the Directorate-General for Research and Innovation, you requested access to:

- ‘1. [a]ll documents mentioning the need to start this research programme [Science Advice for Policy by European Academies] and internal communications on the start of this research programme;
2. [t]he documents regarding the process of decision-making and granting of the [Science Advice for Policy by European Academies] programme to the applicant, the research requested, the offer of the applicant, the decision of EU Commission including all conditions;
3. [a]ll documents regarding the structure of the programme, organisational chart, the names of researchers, names of advisors, names of experts added, names of

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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.

directors and managers, names of people in advisory committees or other committees involved in the research, including all experts and attendants present at meetings and congresses;

4. [a]ll documents produced as part of the programme, (draft) planning, (draft) outcome, workshops, meetings including meeting attendants, articles, links with other research programmes;

5. [a]ll declarations of interest of all experts and scientists involved in this programme;

6. [a]ll documents on the financial contribution of stakeholders to the program [Science Advice for Policy by European Academies].’

Regarding points 1 and 2 of your request, the European Commission considered your request to cover documents drawn up to the date of your initial application of 13 November 2018 and identified the following documents as falling under the scope of your request, registered under reference Ares(2019)683605:

1. Minutes of the information session on the new Scientific Advice Mechanism (SAM) of 13 May 2015 (hereafter ‘document 1’);
2. Annex to the minutes of the Scientific Advice Mechanism taskforce of 23 June 2015 (hereafter ‘document 2’);
3. Annotated agenda of the meeting between Commissioner Moedas and the five presidents of European Academy networks (hereafter ‘document 3’);
4. Annex to the minutes of the Scientific Advice Mechanism Taskforce of 1 September 2015 (hereafter ‘document 4’);
5. H2020 work programme for 2016-2017 of 13 October 2015 – relevant excerpt (hereafter ‘document 5’);
6. Annex to the minutes of the Scientific Advice Mechanism Taskforce of 1 December 2015 (hereafter ‘document 6’);
7. Note for the file - relations with European academies’ networks (hereafter ‘document 7’);
8. Minutes of the Scientific Advice Mechanism Taskforce of 2 June 2015 (hereafter ‘document 8’);
9. Minutes of the Scientific Advice Mechanism Taskforce of 22 July 2015 (hereafter ‘document 9’);
10. Minutes of the Scientific Advice Mechanism Taskforce of 1 September 2015 (hereafter ‘document 10’);
11. Annex to the minutes of the Scientific Advice Mechanism Taskforce of 1 September 2015 (hereafter ‘document 11’);
12. Minutes of the Scientific Advice Mechanism Taskforce of 9 June 2015 (hereafter ‘document 12’);
13. Minutes of the Scientific Advice Mechanism Taskforce of 23 June 2015 (hereafter ‘document 13’);
14. Minutes of the Scientific Advice Mechanism Taskforce of 7 July 2015 (hereafter ‘document 14’);
15. Minutes of the Scientific Advice Mechanism Taskforce of 15 July 2015 (hereafter ‘document 15’);
16. Minutes of the Scientific Advice Mechanism Taskforce of 28 July 2015 (hereafter ‘document 16’);

17. Minutes of the Scientific Advice Mechanism taskforce of 18 August 2015 (hereafter ‘document 17’);
18. Minutes of the Scientific Advice Mechanism Taskforce of 25 August 2015 (hereafter ‘document 18’);
19. Minutes of the Scientific Advice Mechanism Taskforce of 15 September 2015 (hereafter ‘document 19’);
20. Minutes of the Scientific Advice Mechanism Taskforce of 1 December 2015 (hereafter ‘document 20’);
21. Evaluation result letter — Grant agreement preparation invitation letter of 22 July 2016 (hereafter ‘document 21’); and
22. Science Advice for Policy by European Academies Grant Agreement (hereafter ‘document 22’).

In its initial reply of 6 February 2019, the Directorate-General for Research and Innovation partially refused access to documents 7 to 22 based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of the individual), Article 4(2) first indent (protection of commercial interests, including intellectual property) and Article 4(3), second paragraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

Therefore, the scope of your confirmatory request is limited to your claims related to the application of the exception based on the protection of the decision-making process and to documents 12-20. Although you do not explicitly contest the redactions of personal data based on Article 4(1)(b) of Regulation (EC) No 1049/2001, you request the documents ‘uncensored’. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

Points 3 and 4 are currently dealt with by the Directorate-General for Research and Innovation in the context of the request registered under reference GESTDEM 2019/0694. Points 5 and 6 of your request have already been addressed by the Directorate-General for Research and Innovation in the context of your request for access referenced GESTDEM 2018/4600. Point 5 was addressed in the initial reply to this request and point 6 in the proposal for a fair solution of 20 September 2018, reference Ares(2018)5419239.

## **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.

Following this review, I can inform you that further partial access is granted to the documents 12 to 18 based on the revised assessment of the exception of Article 4(3), second paragraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

As regards the remaining documents (19 and 20), the initial decision is confirmed. However, I would like to clarify that a large part of these documents was not withheld on the basis of an exception of Regulation (EC) No 1049/2001, but because they fell outside the scope of your request. Indeed, documents 12 to 20 represent the minutes of the Scientific Advice Mechanism Taskforce. In their meetings, the taskforce discussed, among other issues, the Science Advice for Policy by European Academies research programme. Hence, for these documents only a limited number of points discussed fall within the scope of your request, namely:

- in document 12, only points 3 and 4;
- in documents 13 to 18, only points 4 and 5;
- in document 19, only point 4;
- in document 20, only part of point 0.

The content of the other points in the minutes has been redacted, because they did not fall within the scope of the request. Please find attached the redacted versions of documents 12 to 20, in which it is clearly indicated which parts were redacted because they fell out of the scope of your request and which parts were redacted based on an exception of Regulation (EC) No 1049/2001. The detailed reasons for the partial refusal of the requested documents are 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*)<sup>3</sup>, 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 data<sup>4</sup> (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/EC<sup>5</sup> (hereafter 'Regulation (EU) 2018/1725').

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<sup>3</sup> 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.

<sup>4</sup> Official Journal L 8 of 12.1.2001, page 1.

<sup>5</sup> Official Journal L 205 of 21.11.2018, p. 39.

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

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’.<sup>6</sup>

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’.<sup>7</sup>

Documents 12 to 20 contains personal data such as the names and initials of persons who do not form part of the senior management of the European Commission, as well as names of natural persons, who are not staff members of the European Commission.

The names<sup>8</sup> 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.<sup>9</sup> 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.

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<sup>6</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>7</sup> 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.

<sup>8</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>9</sup> 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.

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 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, nor do you explicitly contest the non-disclosure of personal data. 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.

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 requested documents, 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 paragraph of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] 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 claim that the Directorate-General for Research and Innovation did not analyse separately each document and that it invoked the exception in Article 4(3), second paragraph of Regulation (EC) No 1049/2001 without putting forward details arguments for their decision.

The minutes of the Scientific Advice Mechanism taskforce are internal minutes designed to inform the members of the latest developments regarding certain subjects. Since the members are familiar with the subjects discussed there is very little context and actions and conclusions are described only briefly.

Contrary to your assertion, documents 12 to 20 were analysed in detail and only limited parts of the documents were withheld.

In fact, redactions based on Article 4(3), second paragraph of Regulation (EC) No 1049/2001 were performed only on documents 12 to 18. The withheld parts in documents 19 and 20 were either personal data, which were withheld based on Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation (EC) No 1049/2001 or because they were out of the scope of your request.

In documents 12 and 13 only two words were redacted from the parts falling within the scope of your request. These words refer to individual opinions that reflect an internal deliberation which should be preserved in order to have a smooth and efficient decision-making process. In documents 14 and 15, only one sentence of the parts falling within the scope of your request was withheld in each document. These sentences contain individual positions of the staff of the European Commission on financial aspects of the project which were not retained in the European Commission's final proposals.

Such preliminary options would lead to interpretations and misunderstandings that would seriously undermine the decision-making process, as they would put in the public domain preliminary individual positions, which were not meant for public disclosure. Public disclosure, at this stage, would not only undermine a frank and sincere discussion on possible options among the European Commission services. It would seriously undermine the decision-making process, as it would deprive the institution of a frank internal dialogue on financial aspects of this and similar projects in the future. This, in turn, would seriously undermine the quality of the European Commission's decisions now and in the future.<sup>10</sup>

Therefore, I conclude that this limited redaction in documents 12 to 15 are justified based on Article 4(3), second subparagraph of Regulation (EC) No 1049/2001.

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

The exception laid down in Article 4(3), second paragraph 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 do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(3), second paragraph of Regulation (EC) No 1049/2001.

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<sup>10</sup> Judgment of the Court of Justice of 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 78 and Judgment of the General Court of 15 September 2016, *Philip Morris v Commission*, T-18/15, EU:T:2016:487, paragraph 87.

#### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, (further) partial access are granted to the documents or parts thereof falling within the scope of your request.

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

Enclosure(s): 7