



EUROPEAN COMMISSION

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1000 Brussels
Belgium

**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 2019/999**

Dear ██████████,

I refer to your letter of 26 March 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 20 February 2019, addressed to the European Personnel Selection Office³, you requested access to '[a]ll documents regarding the results [we underline] from the e-tray trial tests organised under the EPSO calls for volunteers published on the European Commission's My Intracomm on [3 December 2018, 16 January 2018 and 26 April 2017]'.

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

- Presentation by the external contractor (██████████
██████████) on the results of the e-tray trial exercise, provided for the meeting of the selection board of competition EPSO/AD/338/17 on 21 June 2017, reference Ares(2018)2620866 (hereafter 'document 1');

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

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

³ EPSO.

- Presentation by the external contractor ([REDACTED]) on the results of the e-tray trial exercise, provided for the meeting of the selection board of competition EPSO/AST-SC/06/17 on 29 March 2018, reference Ares(2019)1611762 (hereafter ‘document 2’);
- Presentation by the external contractor ([REDACTED]) on future selection procedures currently in preparation, of 27 February 2019, reference Ares(2019)1549365 (hereafter ‘document 3’).

In its initial reply of 13 March 2019, the European Personnel Selection Office refused access to document 3 and partially refused access to documents 1 and 2 based on the exceptions of Article 4(1)(b) (protection of the privacy and integrity of the individual) and Article 4(3) (protection of the institution’s decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. 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 your confirmatory application, you first contest the absence of other documents falling within the scope of your request. You claim that there should be more documents such as ‘[c]ommunication between [the European Personnel Selection Office] and [REDACTED], [c]ommunication between [the European Personnel Selection Office] and [REDACTED], [c]ommunication between [the European Personnel Selection Office] and the Selection Board members, [c]ommunication between [REDACTED] and [REDACTED], exchanges between [the European Personnel Selection Office] staff, exchanges between the Selection Board members, studies, briefings, presentations, notes for the file, minutes of meetings’.

As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in the regulation applies only to existing documents in possession of the institution that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union’ concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility.

As part of this review, the European Commission has carried out a renewed, thorough search for possible documents falling under the scope of your request, that is documents related to the results of the e-tray trial test. Based on this renewed search, the European Commission identified the following documents falling within the scope of your request:

- Minutes from the meeting of the selection board of competition EPSO/AD/338/17 on 21 June 2017, concerning e-tray in the above-mentioned competition, reference Ares(2018)2628452 (hereafter: ‘document 4’);

- Minutes of the first meeting with the full Selection Board info-session and e-tray exercise competition EPSO/AST-SC/06/17 12 and 13 April 2018, concerning e-tray in the above-mentioned competition, reference Ares(2019)2584042 (hereafter ‘document 5’).

Following the review, I can inform you that:

- further partial access is granted to document 2;
- partial access is granted to documents 4 and 5.

As regards document 3 and the redacted parts of document 1, I regret to inform you that I have to confirm the initial decision of the European Personnel Selection Office to refuse access, based on the exceptions of Article 4(1)(b) (protection of the privacy and integrity of the individual), and Article 4(3) (protection of the institution’s 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*)⁴, 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 data⁵ (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/EC⁶ (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.

⁴ 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.

⁵ Official Journal L 8 of 12.1.2001, page 1.

⁶ 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’.⁷

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’.⁸

Documents 1 – 5 contain personal data such as the names and initials of persons who do not form part of the senior management of the European Commission. They contain also the name and surname of third party representatives ([REDACTED] [REDACTED]). Moreover, it contains a handwritten signatures in the attendance lists attached to document 4.

The names⁹ 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.¹⁰ 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.

⁷ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁸ 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.

⁹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹⁰ 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. 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.

In particular, as to the handwritten signatures appearing in document 4, 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, 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), first subparagraph 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'.

Article 4(3), second subparagraph of Regulation (EC) No 1049/2001 provides that '[a]ccess 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'.

As a preliminary comment, I would like to clarify that in 2017, the European Personnel Selection Office decided to use the e-tray as the means of examining the candidates in open competition EPSO/AD/338/17 — Administrators (AD 5). Thus, open competition EPSO/AD/338/17 was one of the first open competitions (a generalist competition for graduate administrators) to use the e-tray exercise.

Before the e-tray was actually deployed in the above-mentioned competition, and subsequently in competition EPSO/AST-SC/06/17 for secretaries, the European Commission, in cooperation with its external contractor ([REDACTED]), carried out a trial exercise on a certain number of its staff members, who took part in the exercise on a voluntary basis. The analysis of the results of the trial exercise was then provided to the selection board of open competitions EPSO/AD/338/17 and respectively, EPSO/AST-SC/06/17, which are now closed.

The relevant undisclosed parts of documents 1 and 2 contain information relating to the results of the trial e-tray exercise. In particular, the documents include information about the scope and the nature of the exercise, examples of questions used and an analysis of the replies provided, as well as a description of the method and process for establishing of the scoring methodology. They also include the results of the psychometric analysis of the participants and adjustments that were proposed for implementation in the actual exercise during competitions EPSO/AD/338/17 and EPSO/AST-SC/06/17.

Document 3, whose structure and content is similar to documents 1 and 2, contains the actual content of the e-tray exercises, their competency matrix, scoring grid and evaluation methodology for specific competitions in preparatory phase. This document has been prepared and validated by the contractor and sent to the European Personnel Selection Office for approval. Its purpose is to support deliberations and evaluation by the Selection Board in future competitions. Although this document had not yet been validated by the European Personnel Selection Office, hence its status as ‘draft’, it represented the outcome of a process performed by the external contractor and part of the deliverables specified in the contract. According to the applicable rules on document management, this document was correctly registered.

The content of every e-tray exercise is intended to be re-used in future competitions. Due to technical, organisational and financial constraints, the European Personnel Selection Office is not able to develop new computer-based tests for every future competition. Taking into consideration the complexity of this test, it would be extremely costly and time-consuming.

Therefore, the disclosure of used questions contained in the redacted parts of documents 1 and 2, and in document 3 would seriously undermine the European Personnel Selection Office’s decision-making process, as these, if re-used, might give an advantage to those who have access to them and would thus distort future competitions by compromising the equality of treatment. On the other hand, in case they could no longer be used in future competitions, this would be likely to jeopardise the timely and successful organisation of future competitions.

Consequently, public disclosure of the withheld information included in documents 1, 2 and 3, as explained by the European Personnel Selection Office, would seriously prejudice the confidentiality, objectivity and validity of future competitions.

Additionally, as explained above, the undisclosed parts of documents 1, 2 and 3 contain questions used in the trial and real e-tray exercise, as well as the competency matrix evaluated, and an analysis of the replies provided (the scoring criteria). As confirmed by the case law of the EU Court, information concerning the test material (including the questions) in open competitions organised by the European Personnel Selection Office is covered by a general presumption of non-disclosure¹¹. Indeed, the Court recognised the close link between the information in question and the recruitment procedure and, hence, to the institution's decision-making process.

In your confirmatory application, you claim that documents 1 and 2 are third-party documents created by the external contractor ([REDACTED] [REDACTED] [REDACTED] [REDACTED]) and that the exception provided in Article 4(3), second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001 does not apply.

I cannot share this analysis.

In line with the provisions of Article 7(2)(c) of Annex III of the Staff Regulations, the European Personnel Selection Office shall determine the content of all examinations organised by the institutions. However, once the test material is identified and prepared by the European Personnel Selection Office, it is for the Selection Board of an open competition to decide on the final versions of the tests and validate the test material. This involves the definition of the methodology used to build the pool of the questions/exercises to be used and the analysis of the actual test material. The information included in the redacted parts of documents 1 and 2 is directly linked with the above-mentioned validation process, despite it having been, technically speaking, gathered and presented by a third party. Nonetheless, it still constitutes the integral part of the process for which the sole responsibility lies with the selection board.

Consequently, the relevant undisclosed parts of documents 1 and 2, which provided input for the decisions of the Selection Board, need to be considered as part of the latter's deliberations, which, in line with the Article 6 of Annex III to the Staff Regulation, are covered by the confidentiality principle. Indeed, in line with the case law of the EU Court, Regulation 1049/2001 and the Staff Regulations have to be read together, as neither has precedence over the other¹².

¹¹ Judgment of the General Court (appeals chamber) of 12 November 2015 in Case T 515/14 P and T-516/14 P, *Christodoulos Alexandrou v Commission*, (ECLI:EU:T:2015:844), paragraphs 82 and 86.

¹² *Idem*, paragraphs 68 – 69.

The organisation and conduct of the open competitions requires specific expertise or technical means (for example, infrastructure and facilities allowing for examination of high number of candidates). Such means and expertise are not always at the disposal of the European Commission. Therefore, open competitions are organised by the European Personnel Selection Office with the significant involvement of third parties (external contractors).

The tasks entrusted to third parties are carried out on behalf of the European Personnel Selection Office and have to be intrinsically considered as part of the process for which the European Personnel Selection Office is responsible.

Consequently, these documents, although provided by a third party (the external contractor) have to be considered as reflecting opinions for internal use as part of deliberations and preliminary consultations within the European Personnel Selection Office. They are contractually property of the European Commission, thus not third party documents, and served as a basis for the fine-tuning of the final version of the e-tray exercise in the actual competitions.

As regards documents 4 – 5, these reflect the proceedings (minutes) of the Selection Board in competitions EPSO/AD/338/17 and EPSO/AST-SC/06/17. They contain analyses and validation of the e-tray exercise, as well as analyses and decisions on candidates' results and deliberations regarding complaints by the candidates. Public disclosure of the redacted parts thereof would deprive the provisions of Article 6 of Annex III of Staff Regulation of their intended effect, which is to protect the proceedings of the Selection Boards from external pressure and ensure the objectivity of their work.

Indeed, the European Commission has the obligation to protect the secrecy of the Selection Board's work from undue influence, and therefore to ensure that documents drawn up for internal use and opinions exchanged during internal deliberations are protected, so as to enable an adequate analysis and discussion between the members of the Selection Board.

Against this background, I consider that the relevant undisclosed parts of documents 1, 2, 4 and 5 require protection against the risks associated with public disclosure under the exception provided for under Article 4(3), second subparagraph of Regulation (EC) No 1049/2001. As for document 3, access is refused on the basis of the exception laid down in Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

Please note that some parts of documents 4 and 5 fall out of the scope of your application, as they are unrelated to the results of the e-tray test.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions 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 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), first and second subparagraphs (protection of decision-making process) of Regulation (EC) No 1049/2001.

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.

Consequently, I consider that in this case there is no overriding public interest that would outweigh the interests in safeguarding the protection Article 4(3), first and second subparagraphs of Regulation (EC) No 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested and have come to the conclusion that partial access can be given to documents 4 and 5, and further partial access can be given to document 2.

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*

Enclosures: (3)