



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 2019/616**

Dear ██████████,

I refer to your email of 8 April 2019, registered on 11 April 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 documents² (hereafter 'Regulation (EC) No 1049/2001').

In your initial application of 1 February 2019, you submitted a request for access to the following documents, I quote:

- '[t]he study/analysis carried out by the European Commission to examine the technical and operational feasibility of registered the crossing of external Schengen borders by EU citizens;
- [a]ny supporting documentation produced for the report, for example input from stakeholders in any format (e.g. including but not limited to emails, interview transcripts, notes, reports, documents, etc.), additional studies, statistics, etc'.

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

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

By letter of 28 April 2019, the Directorate-General for Migration and Home Affairs identified the following documents:

- Presentation to the SISVIS Committee, reference Ares(2019)2201656 (hereafter ‘document 1’);
- Questions to Member States, reference Ares (2019)2055740 (hereafter ‘document 2’);
- Final Report, reference Ares (2019)2055462 (hereafter ‘document 3’);
- Study on Integrated Border Management (IBM) for persons not recorded in EES, reference Ares(2019)2055952 (hereafter ‘document 4’).

In its initial reply of 28 March 2019, the Directorate-General for Migration and Home Affairs granted full access to documents 2 to 4 and partial access to document 1, on the grounds that parts of this document fell outside of the scope of your initial request.

In your confirmatory application, you question this reasoning and ask for access to the redacted parts of document 1. You argue that ‘[a]ccording to Regulation 1049/2001, relevant public or private interests “should be protected by way of exceptions,” which are listed in Article 4(1) and 4(2) of that Regulation. A determination that certain content is “out of scope” is not a valid exception’.

You further specify the following, I quote: ‘[i]t is clear from the content of the documents released that a questionnaire was sent to Member States and that interviews were conducted with Member States, Europol and eu-Lisa. However, the documents released do not include the responses to that questionnaire or any interview transcripts. [You are] thus requesting that the questionnaire responses, interview transcripts, and any other relevant supporting documentation be released’.

In your initial application, you specifically mention that you request access to ‘[t]he study/analysis carried out by the European Commission to examine the technical and operational feasibility of registered the crossing of external Schengen borders by EU citizens’ (emphasis added).

The redacted parts in document 1 concern a study on the storing of long-stay documents. Please note that long-stay documents refer to residence permits of different duration, national visas and residence cards and are, by definition, attributed only to non-EU citizens. The latter group is outside the scope of your request, as you are specifically referring to ‘EU citizens’ in your application.

The technical and operational feasibility of registering the crossing of external Schengen borders by EU citizens is unrelated to the question of long-stay documents of non-EU citizens. The study regarding long-stay documents occurred at the same time as the study you refer to in your confirmatory application and both studies were reported to the same committee. Nevertheless, they have nothing in common on the substance. Therefore, I would like to confirm the initial position of the Directorate-General for Migration and Home Affairs, namely that the redacted parts of document 1 fall outside the scope of your request.

Regarding the part of your confirmatory application in which you request access to the responses of the questionnaire sent to Member States, interview transcripts and any other relevant supporting documentation, the European Commission has carried out a renewed, thorough search for the documents requested.

Following this renewed search, I confirm that the European Commission does not hold any documents that would correspond to the description given in your application.

Indeed, as specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. I would like to refer in this respect to the judgment of the Court of Justice in Case C-127/13 P (*Strack v Commission*), according to which ‘[n]either Article 11 of Regulation 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist’.³

The above-mentioned conclusion has been confirmed in Case C-491/15 P (*Typke v Commission*), where the Court of Justice held that ‘the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned and [...] Regulation No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist. It follows that, [...], an application for access that would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation No 1049/2001’.⁴

Furthermore, the General Court held in Case T-468/16 (*Verein Deutsche Sprache v Commission*) that there exists a presumption of lawfulness attached to the declaration by the institution asserting that documents do not exist.⁵ This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence.⁶ The Court of Justice, ruling on an appeal in Case C-440/18 P, has recently confirmed these conclusions.⁷

Given that the European Commission does not hold any documents corresponding to the description given in your application, it is not in a position to fulfil your request.

³ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

⁴ Judgment of the Court of Justice of 11 January 2017, *Typke v Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

⁵ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

⁶ *Ibid.*

⁷ Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18P, EU:T:2018:207, paragraph 14.

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