



EUROPEAN COMMISSION

Brussels, 19.6.2019  
C(2019) 4621 final

[REDACTED]  
[REDACTED],  
[REDACTED]  
28350 Cienpozuelos, Madrid  
SPAIN

**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 applications for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2019/0444, 2019/0574,  
2018/6948, 2018/6949, 2018/6958**

Dear [REDACTED],

I refer to your letter of 12 March 2019, registered on 13 March 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’).

I would like to apologise for the delay in the handling of your application.

**1. SCOPE OF YOUR REQUEST**

In your initial applications of 22 and 25 December 2018, 25 and 30 January 2019, addressed to the European Commission's Directorate-General for Education, Youth, Sport and Culture, you requested access to the following documents:

- ‘Programa de trabajo de la Agencia Nacional “Servicio Español para la Internacionalización de la Educación” relativo al ejercicio 2018 en el marco de la gestión en España del [Programa Erasmus+]’;
- ‘documento[s] donde esté establecido el procedimiento para la solicitud, tramitación, aprobación y/o denegación de la participación en las convocatorias de actividades transnacionales de cooperación en el marco del Programa de la

---

<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.

Unión Europea Erasmus+ empleado por [el Servicio Español para la Internacionalización de la Educación] en los años 2015 a 2018’;

- ‘documento [del Servicio Español para la Internacionalización de la Educación] que justifique que la cuenta para el pago de fondos del programa Erasmus+ no sea mancomunada [...] y que este proceder no infringe el principio de buena gestión financiera’;
- ‘respecto al ejercicio de la función de auditoría interna en el Servicio Español para la Internacionalización de la Educación, justificación documental de la idoneidad de no contar en la selección de personal de pruebas con un programa propio, para el desarrollo de esta función [...]’;
- ‘[...] decisión del [Servicio Español para la Internacionalización de la Educación] por la cual [la versión 1 de la lista de preguntas frecuentes] [fue retirada de la página web]’.

In its initial reply of 27 February 2019 on your above-referred applications, the Directorate-General for Education, Youth, Sport and Culture refused access to these documents stating that Servicio Español para la Internacionalización de la Educación (hereafter 'SEPIE'), which acts as National Agency for the implementation of Erasmus+ programme, had opposed their disclosure on the basis of Article 18(1) e) of Law 19/2013, of December 9, on transparency, access to public information and good governance<sup>3</sup>. In accordance with this provision, ‘requests [...] e) that are manifestly repetitive or have an unjustified abusive nature for the purpose of transparency of this Act, shall be deemed inadmissible by means of a reasoned decision’.<sup>4</sup>

Please note that, although the initial reply indicates that the author of the documents was consulted on the possible disclosure of the above-mentioned documents, the European Commission is in possession of the following document only:

- Erasmus+ Programme – National Agency Work Programme (period 1 January 2018-31 December 2018), SEPIE, European Commission’s Directorate-General for Education, Youth, Sport and Culture, reference Ares(2017)5031301.

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. Therefore, the scope of the confirmatory review is limited to the work programme of SEPIE for the year 2018.

In your confirmatory application, you request a review of the position of the Directorate-General for Education, Youth, Sport and Culture at the initial level. You underpin your request with detailed arguments, which I have taken into account in my assessment.

---

<sup>3</sup> Spanish Official Journal No 295, of 10.12.2013, p. 97922.

<sup>4</sup> In Spanish, the provision reads as follows: ‘se inadmitirán a trámite, mediante resolución motivada, las solicitudes [...] e) que sean manifiestamente repetitivas o tengan un carácter abusivo no justificado con la finalidad de transparencia de esta Ley’.

In your letter, you also complaint about alleged irregularities in the management of the Erasmus+ programme by SEPIE and about alleged conflict of interests involving the former Director of this national agency. Moreover, you request information on the appropriateness of a document elaborated by SEPIE in light of the objectives of the Erasmus+ programme.

Please note, in this respect, that the scope of an initial or confirmatory application based on Regulation (EC) No 1049/2001 is limited to examining whether access to the documents requested can be granted or should be (partially) refused based on the exceptions to the public right of access to documents laid down in that Regulation. Therefore, complaints against the national administration cannot be addressed in the context of a request for access to documents.

Please also note that requests for information are handled in accordance with the Code of Good Administrative Behaviour<sup>5</sup> and not under Regulation (EC) No 1049/2001. Your confirmatory application has been submitted and processed under Regulation (EC) No 1049/2001. Therefore, should you wish to request information regarding the above-referred document originating from SEPIE, you may request it to the Directorate-General for Education, Youth, Sport and Culture, which is best placed to deal with your request in accordance with the relevant procedure under the Code of Good Administrative Behaviour.

## **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 of the European Commission conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

As the work programme of SEPIE for the year 2018 originates from this institution, which forms part of the Spanish administration, the Secretariat-General undertook renewed consultations on the possible disclosure of the document in accordance with Article 4(4) and (5) of Regulation (EC) No 1049/2001. In its consultations with the Spanish authorities, the Secretariat-General noted that it could base its confirmatory decision only on Regulation (EC) No 1049/2001 and not on the national laws of a Member State.

In their reply to the above-referred consultations, the Spanish authorities confirmed their initial opposition to the disclosure of the document based on the exceptions laid down in Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In particular, the Spanish authorities argued that the disclosure of the annual programme for the year 2018 could undermine the audit and control mechanisms to which SEPIE is

---

<sup>5</sup> Official Journal C 285 of 29.9.2011, p. 3.

subject. They referred, in particular, to the regular controls performed by external auditors and certain national authorities, and they argued that any inadequate content of the annual programme could lead to audit investigations and the subsequent adoption of corrective measures.

The Spanish authorities also outlined that the document in question contains a very detailed description of the intended activities for the year of reference and strategic information on the implementation of the Erasmus+ funds. According to the authorities of the Member State concerned, the disclosure of the document would put the national agency concerned at a disadvantage with regard to other national agencies.

Following the confirmatory review, and taking into account the replies of the Spanish authorities to the above-referred consultations, the European Commission considers that, at first sight, the exceptions provided for in Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001 do not apply to the document concerned. However, limited parts of the document warrant protection in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

Consequently, I can inform you that wide partial access is granted to the work programme of SEPIE for the year 2018, subject to the redaction of personal data on the basis of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001, for the reasons explained in Section 2.1 below.

I would like to draw your attention to Article 16 of Regulation (EC) No 1049/2001, which provides that ‘this Regulation shall be without prejudice to any existing rules on copyright which may limit a third party’s right to reproduce or exploit released documents’. Hence, as regards the document partially disclosed, you may reuse it free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the document. The European Commission does not assume liability stemming from the reuse.

Please note, however, that the actual transmission of the document is subject to the absence of a request, by the Spanish authorities, for interim measures as referred to in Section 4 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>6</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>7</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>8</sup> (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.

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>9</sup>

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.<sup>10</sup>

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>10</sup>

---

<sup>6</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>7</sup> Official Journal L 8 of 12.1.2001, p. 1.

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

<sup>9</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>10</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.

The annual programme of SEPIE for the year 2018 contains personal data, such as the names and contact details, including the telephone number, from third parties. The names<sup>11</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>12</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.

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.

---

<sup>11</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>12</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.

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.

Please 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 an overriding public interest.

### **3. 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 document under the request.

As stated above, a wide partial access is herewith granted to the annual programme of SEPIE for the year 2018.

As regards the limited parts of the document which have been redacted, please note that no meaningful partial access is possible without undermining the interests described in section 2.1 above.

### **4. DISCLOSURE AGAINST THE EXPLICIT OPINION OF THE AUTHOR**

According to Article 5(5) and (6) of the Detailed rules of application of Regulation (EC) No 1049/2001<sup>13</sup>, '[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the [European Commission] to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the [European Commission] shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. If the [European Commission] intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.'

At initial and confirmatory level, the Spanish authorities objected to the disclosure of the annual programme of SEPIE for the year 2018 on the grounds that it would undermine the interests protected under Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

---

<sup>13</sup> European Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), Official Journal L 345 of 29.12.2001, p. 94.

The European Commission concludes, after examining the arguments provided by the authorities of the Member State concerned, that, at first sight, the document in question cannot be entirely withheld on the basis of the above-referred provisions. However, limited parts of the document must be protected based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

Since the decision to grant wide access is taken against the objection of the Spanish authorities and the national agency concerned, expressed at initial and confirmatory level, the European Commission will inform the Spanish authorities of its decision to give wide partial access to the document concerned. The European Commission will not grant such partial disclosure until a period of ten working days has elapsed from the formal notification of this decision to the Spanish authorities, in accordance with the provisions mentioned above.

This time-period will allow the Member State author to inform the European Commission whether it will object to the partial disclosure using the remedies available to it, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the third-party author has not signalled its intention to avail itself of the remedies at its disposal, the European Commission will forward the redacted document to you.

## **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: (1)