



EUROPEAN COMMISSION

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██████████
28006 Madrid
Spain

**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 2019/1186**

Dear ██████████,

I refer to your email of 9 May 2019, registered on 10 May 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’). Please accept our apologies for this late reply.

I would like to clarify the context of this confirmatory application before undertaking the analysis of the aspects raised therein.

In your initial application of 2 February 2019 addressed to the Directorate-General for Education, Youth, Sport and Culture, you requested access to, I quote:

‘1) all the agendas/ minutes/ notes/ documents/ presentations/ videos (and any other information) produced and exchanged in the meeting between ██████████ ██████████ ██████████, Cabinet member of Tibor Navracsics, and the European Jewish Congress, on February 25, 2016.

2) a list of all the people present at the meeting and their roles’.

The Directorate-General for Education, Youth, Sport and Culture did not reply to your initial request within the prescribed time limit and this was the reason why you submitted a

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

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

confirmatory application to the Secretariat-General on 27 February 2019, referenced under number GESTDEM 2019/1186.

On 3 May 2019, the Directorate-General for Education, Youth, Sport and Culture sent you the initial reply regarding your request, referenced under number GESTDEM 2019/1186.

In its initial reply, the Directorate-General for Education, Youth, Sport and Culture identified the following documents as falling within the scope of your request:

- Exchange of emails between the European Jewish Cemeteries Initiative and the Cabinet of Commissioner Navracsics from 31 January 2016 and 3 February 2016, reference Ares(2019)2490718 (hereafter document 1’);
- Minutes of the meeting held with the European Jewish Congress from 25 February 2016, reference Ares(2019)2059257 (hereafter ‘document 2’).

The Directorate-General for Education, Youth, Sport and Culture granted wide partial access to the documents, subject to the redaction of personal data contained therein pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001.

Following this reply, on 8 May 2019 the Secretariat-General closed the confirmatory application you submitted on 27 February 2019 and sent you an official closing letter, reference Ares(2019)3059908. In this closing letter, the Secretariat-General informed you that if, upon receipt of the initial reply from the Directorate-General for Education Youth, Sport and Culture, you still wish to submit a confirmatory application in accordance with Article 7 of the Regulation (EC) No 1049/2001, you remain free to do so.

By letter of 9 May 2019, you submitted a new confirmatory application, registered under the same reference number GESTDEM 2019/1186, whereby you contest the initial reply from the Directorate-General for Education, Youth, Sport and Culture.

In this confirmatory application, you argue that the Directorate-General for Education, Youth, Sport and Culture did not send you all the relevant documents. In particular, you argue the following, I quote:

‘[f]or the emails you sent me, I can say that some are missing. For example, the first email is [REDACTED] response (the first email from the European Jewish Congress requesting the meeting is not there). In addition, [REDACTED] response was not sent either’.

I understand from your application that you do not contest the redactions of personal data contained in the documents performed at initial stage. You argue rather that the reply from the Directorate-General for Education, Youth, Sport and Culture of 2 May 2019 is incomplete and that some documents, pertaining to the email exchanges in document 1, are missing.

Against this background, 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.

Please note that in accordance with the Commission Decision on document management³, a document drawn up or received by the Commission must be registered if it contains important information, which is not short-lived and/or may involve action or follow-up by the European Commission or one of its departments.

Therefore, emails that are short-lived and do not fulfil the criteria for registration are automatically deleted from the electronic mailboxes after 6 months. For this reason, the very first email from the European Jewish Congress you are referring to in your confirmatory application, was not identified in the initial reply.

Furthermore, regarding your request to have access to the response from the [REDACTED], [REDACTED], please note that this email does not exist, as it was [REDACTED], the [REDACTED] at the time, who replied on behalf of [REDACTED] on 3 February 2016.

In that context, 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'.⁴ 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'.⁵

Moreover, as the General Court confirmed in its case-law, Regulation (EC) No 1049/2001 cannot oblige an institution to give access to a document that is no longer in its possession.⁶

³ Commission Decision of 23 January 2002 amending its Rules of Procedure, 2002/47/EC, ECSC, Euratom, L 21 of 24.1.2002, article 4.

⁴ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

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

⁶ Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 66.

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.⁷ This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence.⁸ The Court of Justice, ruling on an appeal in Case C-440/18 P, has recently confirmed these conclusions.⁹

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.

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

⁷ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

⁸ *Ibid.*

⁹ Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18P, EU:C:2019:77 paragraph 14.