EUROPEAN COMMISSION

Brussels, 10.9.2023
C(2023) 6181 final

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – GESTDEM 2023/2014

Dear Mr Fanta,

I refer to your email of 2 May 2023, registered on the same day, by which you submitted 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\(^1\) (hereafter ‘Regulation (EC) No 1049/2001’). Please accept our apologies for the delay in handling your request.

1. **Scope of Your Request**

In your initial application of 31 March 2023, addressed to the Directorate-General for Justice and Consumers, you requested access to the following documents:

\textit{The letters sent by the European Commission to member states in December 2021 requesting information about the national legal framework governing the use of spyware from a data protection perspective;}

\textit{The replies received from the member states’.}

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\(^1\) OJ L 345 of 29.12.2001, p. 94.
\(^2\) OJ L 145 of 31.5.2001, p. 43.
The Directorate-General for Justice and Consumers identified the following documents as falling under the scope of your request:

- Letter from the European Commission to all Member States, Ares(2022)8885417;
- Reply from Austria, Ares(2023)681694;
- Reply from Belgium, Ares(2023)746587;
- Reply from Bulgaria, Ares(2023)713542;
- Reply from Croatia, Ares(2023)714414;
- Reply from Cyprus, Ares(2023)745432;
- Reply from Czech Republic, Ares(2023)1636064;
- Reply from Estonia, Ares(2023)1226583;
- Reply from Finland, Ares(2023)1800178;
- Reply from France, Ares(2023)1904121;
- Reply from Greece, Ares(2023)736008;
- Reply from Ireland, Ares(2023)992264;
- Reply from Italy, Ares(2023)709775;
- Reply from Latvia, Ares(2023)812826;
- Reply from Lithuania, Ares(2023)1055322;
- Reply from Luxembourg, Ares(2023)587521;
- Reply from Malta, Ares(2023)746727;
- Reply from Poland, Ares(2023)1381048;
- Reply from Portugal, Ares(2023)1689301;
- Reply from Romania, Ares(2023)878372;
- Reply from Slovak Republic, Ares(2023)1129386;
- Reply from Slovenia, Ares(2023)1726800;
- Reply from Spain, Ares(2023)848200;
- Reply from Sweden, Ares(2023)665465.

In its initial reply dated 2 May 2023, the Directorate-General for Justice and Consumers refused access to the documents based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position and you put forward a number of arguments in support of your application. These arguments will be addressed 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 review of the reply given by the Directorate-General concerned at the initial stage.

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3 Please note that the Ares reference contains in fact 27 identical letters addressed to the 27 Member States.
Following this review, I regret to inform you that I have to confirm the initial decision of the Directorate-General for Justice and Consumers to refuse access to the documents based on the exceptions of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) and the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning the assessment are set out below.

2.1. Protection of the purpose of inspections, investigations and audits and of the ongoing decision-making process

The third indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure’.

The first subparagraph of Article 4(3) 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’.

In accordance with the case-law of the Court of Justice, ‘a European Union institution may take into account cumulatively more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 when assessing a request for access to documents held by it’ and two different exceptions can, as in the present case, be ‘closely connected’⁴. Accordingly, the exceptions relating to the protection of the ongoing decision-making process and the purpose of inspections, investigations and audits are, in the present case, closely connected. The outcome of the ongoing investigation and findings stemming from it, will determine the next steps and future action of the European Commission on this matter.

The Court of Justice ruled in France v Schlyter judgment that ‘[w]ithout there being any need to identify an exhaustive definition of ‘investigation’, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the EU and FEU Treaties must be considered to be an investigation’⁵.

Furthermore, the Court stressed that ‘[t]hose procedures do not necessarily have to have the purpose of detecting or pursuing an offence or irregularity. The concept of ‘investigation’ could also cover a Commission activity intended to establish facts in order

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⁴ Judgment of 13 September 2013, Netherlands v Commission, T-380/08, EU:T:2013:480, paragraphs 26 and 34.

to assess a given situation. It is an autonomous concept of EU law which must be interpreted taking into account, inter alia, its usual meaning as well as the context in which it occurs.

The documents constitute the Commission’s letter to Ambassadors of EU Member States, whereby it inquired about the applicable legal frameworks as regards the use of spyware by national authorities in those Member States, and the replies received from several Member States. The letter was sent in the context of the investigation conducted by the European Parliament’s Committee of Inquiry of the use of ‘Pegasus’ and equivalent surveillance spyware. The European Parliament adopted a resolution on 15 June 2023, in which the MEPs call for credible investigations, legislative changes and better enforcement of existing rules to tackle abuse, while issuing recommendations for specific countries.

The questions, opinions and assessments contained in this document do not represent the final views of the Commission and cannot be interpreted as setting its future position in terms of regulating the use of spyware. The final analysis performed by the Commission would not necessarily reflect what is indicated in the document, which is a preliminary questionnaire and not a definitive assessment.

The replies of the Member States contain detailed information about the applicable legal framework in the field of spyware shared with the European Commission in the specific and sensitive context of the implications of Pegasus spyware for the fundamental rights and freedoms of citizens, in particular the privacy, protection of personal data and integrity of natural persons.

These exchanges took place in the context of activities aimed at ensuring that the Commission has all the information necessary to conduct a wide-ranging assessment of impacts of all available options.

The documents form part of the ongoing work and assessment of the Commission with a view to determining the next steps for action. The outcome of this assessment is uncertain at this stage. Disclosure of these documents would seriously undermine the purpose of the Commission’s ongoing investigation and the climate of mutual trust which is necessary in order to ensure that the investigation is conducted properly and smoothly. Disclosure of the documents at this stage would negatively influence the discussions in which the European Commission and the national authorities have engaged. To that end, the Court of Justice confirmed that the exception under Article 4(2) third indent, applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits. It is exactly that interest, which the Commission argues could not be fulfilled if the documents were to be disclosed, as such a situation

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6 Ibid, paragraph 47.
7 Ibid, paragraph 45.
would endanger the purpose of the investigation in itself. It is for that reason that various acts of investigation may remain covered by the exception in question so long as that goal has not been attained, even if the particular investigation or inspection which gave rise to the document to which access is sought has been completed.

It follows that non-disclosure of the documents requested during the preliminary stages of an inquiry is justified as long as there is a risk of affecting the conduct of the investigation, altering its decision-making progress or undermining the objectives of that procedure, such as in the present case.

In your confirmatory application, you state, that ‘[...] the European Ombudsman has stressed the fact that the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Furthermore, institutions need to prove, for each individual document, that disclosure would undermine the investigation and provide clear reasoning on the motives for non-disclosure (European Ombudsman Case: 2004/2013/PMC 05). Likewise, the General Court found in Franchet and Byk v Commission that the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision applies only if disclosure may endanger the completion of the investigation, inspection or audit.’

In the present case, disclosure of the documents requested would undermine the protection of the purpose pursued by the Commission’s investigation and the protection of the decision-making process from external pressure.

Their disclosure, in light of their preliminary nature, would undermine the climate of mutual trust with the Member States concerned and seriously undermine the ongoing decision-making, the independence and objectivity of which must be ensured. Such disclosure would risk inciting restraint during future assessments and limit the exchanges of uncensored, independent opinions and advice necessary for the accomplishment of the institution’s task. It would strain the working relations between the European Commission and the Member States’ national authorities.

In addition, disclosure of the documents to which you request access would not only negatively influence the dialogue between the European Commission and the authorities of the Member States concerned, for which a climate of trust is essential, but would also hinder the Commission in defining the line to take for this file free from outside interference and open the door to undue external pressure, as it would disseminate preliminary considerations of the European Commission and of the representatives of the authorities of the Member States concerned that do not represent the final position of the European Commission. This could lead to speculations, premature conclusions, and serious interference with the Commission’s decision-making process as to the next steps.

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11 T-391/03, Franchet and Byk v Commission, (supra) paragraph 110
to take, and would be detrimental to the proper conduct of the investigation and undermine its effectiveness.

The purpose of such investigations is best achieved free from external pressure. The risk of such external pressure is real and not hypothetical given the specific and sensitive nature of Pegasus spyware's implications for fundamental rights and particularly the privacy, protection of personal data and the integrity of natural persons.

Indeed, as the General Court has held, ‘the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process’¹².

In these circumstances, there is a real and non-hypothetical risk that disclosure of the documents requested would adversely affect the ongoing above-mentioned assessment and its follow-up and the ongoing decision-making process. In order for the European Commission to be able to carry out its tasks, there has to be a protected space throughout the different stages of the above-mentioned process.

Please note that it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing the documents concerned and, thereby, depriving the exception of its very purpose¹³.

Consequently, the Secretariat-General concludes that, pursuant to the third indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, the documents requested cannot be disclosed, as their public disclosure would seriously undermine the purpose of investigations and the ongoing decision-making process.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) and the first subparagraph of 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. It is for the applicant to put forward specific circumstances that show that there is an overriding public interest, which justifies the disclosure of the documents concerned¹⁴.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of access to the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public

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¹⁴ See e.g. judgment of the General Court of 5 December 2018 in Case T-312/17, *Campbell*, EU:T:2018:876, paragraph 58.
interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal.\textsuperscript{15}

In your confirmatory application, you state that ‘there is an overriding public interest in disclosure of the documents. Allegations of spyware misuse by member states are currently under investigation by the European Parliament in the PEGA committee, which is set to conclude this year. Withholding information on follow-up actions by the European Commission in regards to legal situation as well as potential use and misuse of spyware is therefore of clear damage to the public interest, as it obstructs the proper work of the PEGA Committee and its tentative conclusions’.

While the Secretariat-General appreciates the particularly sensitive implications of the use of Pegasus spyware, having analysed your arguments, it has not been able to identify any public interest in disclosure of the withheld documents capable of overriding the interests described above. The fact that this subject matter is of interest to the wider public or to the Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware (PEGA) of the European Parliament does not mean that the publication of the withheld documents cannot have any impact on the protection of the purpose of investigations and of the ongoing decision-making process, nor does it mean that there is an overriding public interest in disclosing the documents in question.

Furthermore, please note that general considerations or references to transparency do not demonstrate a pressing need for the disclosure of the documents requested and cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the documents in question.\textsuperscript{16}

Nor has the Secretariat-General been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2) and the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

To the contrary, the Secretariat-General considers the overriding public interest to be better served by ensuring the protection of the purpose of investigations and of the ongoing decision-making process.

The Secretariat-General concludes therefore that an overriding public interest has not been demonstrated in this particular case.


\textsuperscript{16} Judgment of the Court of Justice of 14 November 2013, Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.
4. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting partial access to the documents requested.

However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

Consequently, the Secretariat-General has come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

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,

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CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

*For the Commission*
Ilze JUHANSONE
Secretary-General