



EUROPEAN COMMISSION

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Mr Kieran FITZPATRICK  
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**DECISION OF THE SECRETARY-GENERAL ON BEHALF OF THE COMMISSION PURSUANT  
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - Gestdem 2018/629**

Dear Mr FITZPATRICK,

I refer to your email of 19 February 2018, registered on 20 February 2018, 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> ('Regulation 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 30 January 2018, you requested access to [d]ocumentation which helps to identify those member states of the EU which have not been supportive of the EU's (former) efforts to bring into effect the access to justice (ATJ) Directive related to the Aarhus Convention, namely COM 2003/0624 (Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters /\* COM/2003/0624 final - COD 2003/0246 \*, i.e. "the Directive").

In your application, you clarified that you are particularly interested in:

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<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.

1. (...) *any documentation which indicates any member state's reluctance (or any reluctance as expressed by any official of a member state) to implement the specified proposed EU Directive,*
2. *If there is documentation available as requested in question 1, but which fails to identify all member states which have failed to support the Directive, then [you] would seek (...) any documentation which outlines support for the Directive by any or all members states (or by officials thereof),*
3. *If and when the above documentation (questions 1/2) is made available, it fails to clarify the attitude of each member state to the proposed Directive, or no such documentation is obtainable, then, [you] seek (...) all documentation between the Commission (including any commissioner and/or any EU official) to any member state (or any ministry or emanation or official of a member state), which sought to gain information on the attitude of any member state towards implementation of the Directive.*

You also underlined that [w]here there are multiple documents which outline the attitude of a particular member state to the Directive, then [you] seek only the most recent documentation which clarifies such an attitude.

Your initial application was attributed to the Directorate-General for Environment, which provided its reply on 19 February 2018.

In its reply, the Directorate-General for Environment informed you that in 2014, the Commission decided to withdraw the proposal for the Directive in question and provided you additional background information concerning that withdrawal. The Directorate-General for Environment also referred you to publically available information (by providing hyperlinks to the relevant pages on the *Europa* website).

The Directorate-General for Environment also disclosed the Working Document on possible options for a new Commission initiative on access to justice<sup>3</sup>, prepared in 2013 by the Commission in the context of the discussions on the proposal of the above-mentioned Directive in the relevant Working Group in the Council.

Finally, the Directorate-General for Environment underlined that due to a high turnover of officials in charge of the above-mentioned file, it was not able to identify any other documents (other than those mentioned above), such as minutes of the respective Council Working Group.

Through your confirmatory application, you request a review of this position and present arguments supporting your request. You point out that certain hyperlinks included in Directorate-General for Environment initial reply lead to pages that are not functional anymore.

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<sup>3</sup> Ares(2018)941159.

In particular, the *link [to] the questionnaire/consultation results is not functional, nor is your letter link to a 'short summary'*. Further, you request access to that questionnaire, which, in your view, falls under the category of documents described in point (3) of your initial application, and raise a series of questions regarding the public consultations in which the above-mentioned questionnaire was used. The questions relate to the various procedural aspects of the consultations, and consequently, they will be assessed in point 3 of this decision.

With regard to the *short summary* outlining the activities of the Commission's expert group on Aarhus Implementation (group's reference: E00390), it can be found in the Commission Register on Expert Groups<sup>4</sup>.

As regards the minutes of the Council Working Group meeting of 13 May 2013, which, according to the reply of Directorate-General for Environment, the latter does not hold, you argue that Directorate-General for Environment *did not clarify if such minutes are held by other EU entities*. In this context, you refer to Article 7 of Regulation 1367/2006<sup>5</sup> and the obligations<sup>6</sup> provided for therein.

Against this background, the Commission has carried out a renewed, thorough search for the documents falling under the scope of your application. The scope thereof is interpreted to cover the documents containing information regarding the Member State(s) that were (i) *reluctant* to support the draft Directive 2003/062 and those which (ii) *did support* that Directive, as well as (iii) the communications (from the Commission) aimed at gaining *information on the attitude of any member state towards implementation of the [above-mentioned] Directive*. Following this renewed search, the Commission has identified the following documents (in addition to the ones identified and referred to by Directorate-General for Environment in its initial reply) as falling under the scope of your application:

- Statistics of responses provided through the questionnaire in the public consultations on *Access to justice in environmental matters – options for improving access to justice at Member State level* (hereafter 'document 1'),

The document was generated by means of results/search page of the Internal Policy Making tool<sup>7</sup>. The document contains the list of multiple-

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<sup>4</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm>. It is not possible to provide the direct hyperlink to the page containing the summary. It is necessary to enter the keyword *Aarhus* or the number of the group (E00390) in the browser field available on the above-mentioned webpage.

<sup>5</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Official Journal L 264 of 25.9.2006, p. 13.

<sup>6</sup> Where a Community institution or body receives a request for access to environmental information and where this information is not held by that Community institution or body, it shall (...) inform the applicant of the Community institution or body or the public authority within the meaning of Directive 2003/4/EC to which it believes it is possible to apply for the information requested or transfer the request to the relevant Community institution or body or the public authority and inform the applicant accordingly.

<sup>7</sup> The tool used by the Commission for public consultations.

choice questions, forming part of the public consultation in 2013. The questionnaire is not available on-line any more, given the closure of the related consultation.

It includes also the statistics for the replies received from public authorities (national/regional/local authorities or national judges) to the consultation,

- Summary of the Council Group meeting of 21 November 2003, ref.: Ares(2018)1100116 (hereafter: ‘document 2’),
- Summary of the Council Group meeting of 16 December 2003, ref.: Ares(2018)1100178, (hereafter: ‘document 3’),
- Report from Council Environment Group’s meeting of 3 March 2005, ref.: Ares(2018)1100231, (Hereafter: ‘document 4’),
- Summary outlining the issues discussed during the meeting of the Working party on International Environment Issues on 13 May 2013, ref.: Ares(2018)1100264<sup>8</sup>, (hereafter: ‘document 5’).

With regard to the minutes of the Council Working Group meeting of 13 May 2013, as the Commission does not hold this document, in line with the provisions of Article 7 of Regulation 1367/2006, your application was transmitted to the Council for handling and follow-up.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I am pleased to inform you that full access is granted to document 1. Wide partial access is granted to documents 2 – 5, with only personal data redacted on the basis of the exception in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, as explained in point 2.1 of this decision. Please find copies of these documents enclosed.

Please note that only some parts of documents 2 – 5 concern positions of the Members States to implement the draft Directive in question. The remaining content concerns different aspects of the process and does not reflect such positions. This information falls outside the scope of your application. Consequently and therefore, it has been removed from the documents released.

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<sup>8</sup> This document does not contain the *minutes* of that meeting. The Commission staff prepared it solely for internal purposes.

## 2.1 Protection of the privacy and integrity of the individual

Article 4(1)(b) of Regulation 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.*

The relevant undisclosed parts of documents 2 – 5 contain the names and surnames and contact details (email address) of Commission staff members not holding any senior management position.

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001, which defines it as *any information relating to an identified or identifiable natural person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.*

It follows that public disclosure of all above-mentioned personal information, would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling<sup>9</sup>, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative<sup>10</sup>.

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the Institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject<sup>11</sup>.

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<sup>9</sup> Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.* (ECLI:EU:C:2010:378), paragraph 63.

<sup>10</sup> Ibid, paragraphs 77-78.

<sup>11</sup> Ibid.

Indeed, in the recent judgment in the *ClientEarth* case, the Court of Justice ruled that *whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access*<sup>12</sup>. I refer also to the *Strack* case, where 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>13</sup>.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing the personal data included in documents 2 – 5.

Therefore, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in documents 2 – 5 cannot be considered as fulfilling the requirements of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

### **3. ISSUES FALLING OUTSIDE THE SCOPE OF THE ASSESSMENT UNDER REGULATION 1049/2001**

In your confirmatory application, you argue that the initial reply of Directorate-General for Environment, *fail[s] to clarify, if the questionnaire was sent to all 28 member states [...]. In this context, you suggest that the Commission could provide [you with] a copy of the questionnaire as sent to each member state Environment-Ministry, or provide one such questionnaire in English, clarifying the dates that it was sent to each state.*

You also ask to clarify *if any particular state failed to respond to the questionnaire, was a reminder letter/email sent?*

I would like to clarify that the questionnaire, containing the same questions as those included in document 1, was made available to the general public in the context of the public consultations held from 28 June until 23 September 2013. Consequently, no questionnaire was *sent* specifically to the authorities of any Member State.

The participation in the consultations was voluntary and open to the general public. Authorities in the Member States were also entitled to take part in the consultations and some of them effectively did so. Due to the voluntary character of the consultations no reminders were sent to the authorities of the Members States, which decided not to participate in the consultations.

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<sup>12</sup> Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

<sup>13</sup> Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

#### **4. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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*