



EUROPEAN COMMISSION

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Ms Béatrice Gorez
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Arrangements
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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 2019/1013 and 1014**

Dear Ms Gorez,

I refer to your email of 25 March 2019, registered on the same date, 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

On 20 February 2019, you submitted two initial applications in which you requested access to the following documents:

‘The letter, including the Proposed Action Plan, sent to Korea on 26 November 2013, as mentioned in Paragraph 2 of the Notice of Information published in O[fficial] J[ournal] C 142 of 29 [April] 2015, page 5’.

This initial application was registered under the reference number Gestdem 2019/1013.

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

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

‘The report established by D[irectorate]-G[eneral] [for Maritime Affairs and Fisheries³] and used to propose to the [European] Commission to decide the termination of the demarches with Korea, as mentioned in the Notice of Information published in O[fficial] J[ournal] C 142 of 29 [April] 2015, page 5.’

This initial application was registered under the reference number Gestdem 2019/1014.

As the above-mentioned documents relate to the activities of the European Commission under Regulation (EC) No 1005/2008⁴, your initial applications were attributed to the Directorate-General for Maritime Affairs and Fisheries for handling and reply.

With regard to your application Gestdem 2019/1013, the Directorate-General for Maritime Affairs and Fisheries has identified the following documents as falling under its scope:

- Letter of 26 November 2013 from the European Commission to the authorities of the Republic of Korea, reference: Ares(2013)3566933 (hereafter ‘document 1’), with one annex containing the plan of suggested actions in relation to Article 33 of Regulation (EC) No 1005/2008 (hereafter ‘document 1a’).

The Directorate-General for Maritime Affairs and Fisheries replied to your application on 13 March 2019. It refused access to documents 1 and 1a, based on the exception provided for in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001, protecting international relations.

With regard to your application Gestdem 2019/1014, the Directorate-General for Maritime Affairs and Fisheries informed you that it does not hold any documents that would fall under the scope of that application.

Through your confirmatory application, you request a review of this position. In particular, you question the applicability of the exception provided in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 to documents 1 and 1a. Additionally, you contest the position of the Directorate-General for Maritime Affairs and Fisheries regarding non-existence of documents falling under the scope of your initial application Gestdem 2019/1014.

Following your additional explanations concerning the subject matter of your initial application Gestdem 2019/1014, included in the confirmatory application, the European Commission identified the following (new) documents falling under its scope:

- Letter dated 21 April 2015 from Commissioner Vella to the Minister of Oceans and Fisheries of the Republic of Korea, reference: Ares(2015)1688376 (hereafter: ‘document 2’),

³ DG MARE.

⁴ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. Official Journal L 286, 29.10.2008, p. 1–32.

- Letter dated 17 March 2015 from the Directorate-General for Maritime Affairs and Fisheries to Commissioner Vella on the outcomes of the mission to the Republic of Korea and proposed way forward, reference: Ares(2015)1173112 (hereafter: 'document 3'),
- Note to the file dated 10 March 2015 prepared by the Directorate-General for Maritime Affairs and Fisheries concerning mission to the Republic of Korea, reference: Ares(2015)1055056 (hereafter: 'document 4').

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General or service concerned at the initial stage.

Following this review, I am pleased to inform you that full access is granted to document 1a and wide partial access is granted to documents 1 and 2, with personal data redacted based on the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001.

Partial access is granted to documents 3 and 4. The redacted parts thereof contain information protected by virtue of the exceptions protecting privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001), public interest as regards international relations (Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001) and the purpose of inspections, investigations and audits (Article 4(2), third indent of Regulation (EC) No 1049/2001).

Please also note that the relevant parts of documents 3 and 4 contain information falling outside the scope of your initial application (for example information relating to other country than the Republic of Korea, or technical details relating to organisation of an event), which were redacted as such.

The detailed reasons are set out below.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that 'the 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), 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 (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 the above-mentioned 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.

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 2018/1725.

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

Documents 1 and 2 contain the biometric data such the handwritten signatures of Commissioner Damanaki (document 1) and Commissioner Vella (document 2).

Documents 3 and 4 includes the names, surnames and initials of staff members of the European Commission who do not hold any senior management position. Additionally, document 4, contains the names, surnames and hierarchical positions of the representatives of third parties (Ministries of the Republic of Korea and organisations).

This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) No 2018/1725 and in the sense of the Bavarian Lager judgment.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, can the transmission of personal data occur.

Furthermore, 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. 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 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 subject's legitimate interests might be prejudiced.

In this context, I would like to point out that the right to the protection of the privacy is recognised as one of the fundamental rights in the Charter of Fundamental Rights, as is the transparency of the processes within the Institutions of the EU. The legislator has not given any of these two rights primacy over each other, as confirmed by the Bavarian Lager case-law referred to above.

Based on the information at my disposal, I note that there is a risk that the disclosure of the names of the individuals appearing in the requested document would prejudice the legitimate interests of the third-parties concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9(1)(b) of Regulation (EU) 2018/1725, 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 disclosure of the personal data concerned.

Furthermore, as the handwritten signatures included in documents 1 and 2 are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

2.2. Protection of international relations

Article 4(1)(a), third indent 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 public interest as regards [...] international relations [...]'].

As far as the protection of international relations is concerned, the EU Court has acknowledged that the institutions enjoy a wide discretion when considering whether access to a document may undermine that public interest⁵.

⁵ Judgment of the Court of First Instance of 25 April 2007, in Case T-264/04, *WWF European Policy Programme v Council*, EU:T:2007:114, paragraph 40.

The documents requested in your initial application of 14 May 2018, concern the relations between the EU and a third country (the Republic of Korea). Indeed, they reflect interactions with the authorities of that country in the context of the procedure provided for in the above-mentioned Articles 31 – 33 of Regulation (EC) No 1005/2008.

The relevant undisclosed parts of documents 3 and 4 include the description of findings and detailed evaluations thereof by the services of the European Commission. They also include information concerning the position of the authorities of the Republic of Korea to those findings and description of actions taken at the technical level to address the issues identified by the European Commission.

The decision to lift the pre-identification status of a third country (as provided for in the Notice of Information published by the European Commission on 29 April 2015) relies on an exhaustive internal assessment that takes into account the actions and reforms undertaken by the concerned third country all along the dialogue process. The relation with the authorities of the Republic of Korea have been drawn up in the context of a process concerning alleged failures by that country to meet their international obligations for the conservation of fishery resources and for the cooperation therein.

The EU main interest is to encourage the Republic of Korea (as well as other third countries) to comply with the relevant international obligations in a smooth and peaceful manner without recourse to more onerous international dispute settlement procedures and without any further interference that might aggravate the dispute.

In this context, an atmosphere of trust and confidentiality is a prerequisite for a successful completion of the dialogue with the country concerned in the perspective of inducing them to comply with their conservation and cooperation obligations. The breach of the trust would jeopardise the relations between the EU and the countries concerned. Disclosure of information included in the internal documents and concerning the assessment of the compliance of third countries with their international obligations would compromise the EU objective of resolving this matter with these countries in a cooperative manner and in a climate of mutual trust and in a long standing perspective.

Disclosure of the information relating to internal national reform processes could also be detrimental to legitimate trade flows between the parties and put at state the credibility of the Republic of Korea as fish supplier at global level.

In the light of the above, I conclude that, there is a reasonable risk that public disclosure of the document concerned is likely to harm the interest protected by Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

2.3. Protection of the purpose of inspection, investigation and audit

Article 4(2), third indent of Regulation 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of [...] investigations [...] unless there is an overriding public interest in disclosure.’

The cooperation envisaged in Article 20(4) of Regulation (EC) No 1005/2008 and interactions following the completion of procedures provided for in Chapter VI of that regulation, involve inspections and visits carried out by the services of the European Commission in liaison with the authorities of the Republic of Korea. The undisclosed parts of the documents requested contain information gathered in the context of these inspections and investigations.

It needs to be underlined that publication of the Notice of Information on 29 April 2015 does not bring the process under Regulation (EC) No 1005/2008 to an end. Indeed, that process is still ongoing as the European Commission is closely monitoring the evolution and effective implementation of measures taken by the authorities of the Republic of Korea in order to ensure the compliance of that country with its obligations under international law.

The monitoring process is implemented through a regular exchange of information and data (such as the state of the revision of national legislation, as well as the administrative and penal proceedings or sanctions). The European Commission also analyses draft legal acts, decrees, ordinances, circulars and templates of documents used in controls, which are adopted or established by the Korean administration in relation to its control policy aiming at eliminating illegal, unreported and unregulated fishing activities. Such exchanges take place on a regular basis and are then summarised in exchanges taking place during the working groups on illegal, unreported and unregulated fishing, taking place on a yearly basis.

Representatives of the European Commission (the Directorate-General for Maritime Affairs and Fisheries) also have regular meetings with the authorities of the Republic of Korea. The last meeting took place in October 2018 in the framework of the established bilateral working group on illegal, unreported and unregulated fishing.

As in previous years, in 2019 the services of the European Commission will interact with Korean authorities in relation to amendments to existing legislation regarding the implementation of national obligations under international law of the sea.

Consequently, the evaluation under Regulation (EC) No 1005/2008 is fully ongoing. The evaluation process, in the light of the case law of the EU Court⁶, is an investigation within the meaning of Article 4(2), third indent, of Regulation (EC) No 1049/2001, as it is a structured and formalised process that has the purpose of collecting and analysing information in order to enable the European Commission to take further steps envisaged in Articles 31 – 33 of Regulation (EC) No 1005/2008. The ultimate purpose of that evaluation process is enable and ensure that the third countries (in the case at hand, the Republic of Korea) comply with the relevant provisions of international law applicable to the area of illegal, unreported and unregulated fishing.

⁶ See judgment of the Court of Justice of 7 September 2017, *Schlyter v Commission*, C-331/15 P, EU:C:2017:639, paragraph 46.

The undisclosed parts of documents 3 and 4 contain information has a direct link with the ongoing cooperation and possible audits in the context of the subsequent stages of the evaluation under Regulation (EC) No 1005/2001.

Indeed, the information included in the documents in question, if publically disclosed, would put the authorities of the Republic of Korea in a delicate and difficult position and affect the climate of trust between them and the services of the European Commission. Consequently, it would adversely affect the dialogue between the Commission and the Republic of Korea, thereby putting the ongoing investigations, their follow-up and possible results in jeopardy. I consider the risk that the Korean authorities would become less willing to cooperate in the context of the process under Regulation (EC) No 1005/2008 as reasonably foreseeable and not purely hypothetical. Consequently, the purpose of the process under above-mentioned regulation would be undermined.

I conclude, therefore, that access to the requested documents, which form part of an investigation file under Regulation (EC) No 1005/2008, must be denied on the basis of the exception laid down in the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions in Article 4(1)(a) and Article 4(1)(b) of Regulation (EC) No 1049/2001 do not need to be balanced against overriding public interest in disclosure.

The exception laid down in Article 4(2), third indent, 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.

In your confirmatory application, you do not refer to any particular overriding public interest that would warrant public disclosure of the withheld parts of documents 3 and 4.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the interest provided for in Article 4(2), third indent, of Regulation (EC) No 1049/2001, which in this case the need to protect the information relevant for the ongoing investigations under Regulation (EC) No 1005/2008.

4. PARTIAL ACCESS

Wide partial access is hereby granted to the documents concerned. No further partial access is possible, having regard to the need to protect some parts of the documents at issue, by virtue of the exceptions referred to in section 2 of this decision.

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

Enclosures: (4)