

**Reply of the European Commission to the request for information from the European Ombudsman**  
**- Complaint by Mr [REDACTED], ref. 763/2020/DL**

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## **I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY**

On 9 December 2019, the complainant, an academic, submitted five initial applications<sup>1</sup> for access to ‘all replies to confirmatory applications based on Regulation (EC) No 1049/2001 adopted by the European Commission in 2014, 2015, 2016, 2017 and 2018’.

The application was dealt with by Directorate C of the Secretariat-General of the European Commission, responsible for ‘Transparency, Efficiency & Resources’. In its fair solution proposal of 23 December 2019, the Secretariat-General described in detail the actions needed in order to handle these requests and concluded that the handling of the applicant’s five simultaneous requests could not be completed within the normal time limits set out in Article 7 of Regulation (EC) No 1049/2001. Furthermore, it asked the applicant to narrow down the scope of the requests and to reduce them to a more manageable number.

In his counter-proposal of 28 December 2019, the applicant reduced the scope of his requests to all the confirmatory decisions adopted in 2018. Consequently, the Secretariat-General has come to the conclusion that handling the full scope of the applicant’s five initial applications, or of the applicant’s proposal of 28 December 2019, would involve an excessive administrative burden that would be disproportionate to the applicant’s possible interest in obtaining the requested documents.

Therefore, the Directorate C of the Secretariat-General of the European Commission has proceeded to the unilateral restriction of the scope of the applicant’s initial applications, so as to bring it down to a more manageable number of documents. It has decided, per the Secretariat-General’s second fair solution proposal of 7 January 2020, to handle 30 documents covered by the applicant’s requests, namely the 30 confirmatory decisions, excluding their annexes, which were last adopted in the year 2018.

In its initial reply of 30 January 2020, Directorate C of the Secretariat-General of the European Commission granted wide partial access to the 30 identified documents, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and of the first indent of Article 4(2) (commercial interests of a natural or legal person) of Regulation (EC) No 1049/2001.

In the confirmatory decision C(2020)702 final of 4 February 2020, the European Commission confirmed the initial decision of Directorate C of the Secretariat-General of the European Commission to grant wide partial access to those documents, based on the same exceptions.

## **II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN**

On 4 May 2020, the complainant turned to the European Ombudsman.

In his complaint, the applicant argues that ‘the Commission fails to proactively publish

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<sup>1</sup> Registered under references GESTDEM 2019/7132, GESTDEM 2019/7134, GESTDEM 2019/7136, GESTDEM 2020/7137 and GESTDEM 2020/7138.

decisions pertaining to confirmatory applications, which is a norm of sound administration, and is already the common practice of the Council of the EU. This made it impossible for me directly access binding and precedent-setting legal interpretations of a public authority in relation to Regulation 1049/2001. A European citizen should ordinarily be able to expect such transparency of EU institutions, which would furthermore facilitate the academic purpose of legal analysis. The Commission failed to justify its reason for not ensuring proactive disclosure of this document type when it was invited to do so. Under these circumstances, I cannot but conclude that the administrative burden caused by my access request (see following points) is the result of an unfortunate policy choice made by the Commission itself.’

### **III. EUROPEAN OMBUDSMAN’S INQUIRY**

Based on the complaint, the European Ombudsman opened an inquiry concerning the proactive publication of the European Commission’s confirmatory decisions.

The European Ombudsman also raised a question concerning the statistics provided by the European Commission in its annual reports on the application of Regulation (EC) No 1049/2001.

As a first step, the European Ombudsman asked the European Commission to give its view on the matter.

### **IV. THE REPLY OF THE EUROPEAN COMMISSION**

Transparency is an important tool to reinforce the trust of the citizens and civil society organisations regarding decisions adopted by the European Commission. The European Commission closely interacts with interested citizens and has already answered numerous requests for access to its confirmatory decisions.

Confirmatory decisions are formal European Commission acts adopted via the delegated procedure<sup>2</sup>. It is important to mention that the term ‘confirmatory decision’ in this case includes both the confirmatory reply, in which the European Commission explains its reasoning for granting or (partially) refusing access to documents and, if applicable, the documents disclosed to the applicant.

#### **Report from the Commission on the on the application of Regulation (EC) No 1049/2001**

As regards comments on the European Commission annual report on the application of Regulation (EC) No 1049/2001 it needs to be highlighted that the European Commission remains by far the EU institution handling the largest number of requests for access to documents under Regulation (EC) No 1049/2001. In 2019, it reached its highest number of requests ever since the entry into force of the Regulation (EC) No 1049/2001 in 2001, having received no less than 7,445 initial applications. As regards confirmatory applications requesting a review by the European Commission of initial replies fully or partially refusing access, their number amounted to 334 in 2019, reflecting an increase of 5% in comparison with 2018.

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<sup>2</sup> In accordance with Article 14 of the European Commission’s Rules of Procedure, the power to take decisions on confirmatory applications is delegated to the Secretariat-General of the European Commission.

The statistics show that the requested documents were fully or partially disclosed in almost 78% of the 7,445 cases at the initial stage, and wider or even full access was granted in 53.4% of the 296 cases reviewed at the confirmatory stage. The data not only confirm the openness of the European Commission, but also the importance of the right of access to documents as part of the institution's overall transparency policy.

It should be emphasized that the Annual Report details the rate of use of the exceptions provided under Article 4 of Regulation (EC) No 1049/2001, both at initial and confirmatory stages, in a similar fashion to the European Parliament and Council's respective Annual Reports. The European Commission does not, however, take into account the fact that some exceptions have been combined, which is in the majority of the cases, but takes into consideration, for the purpose of retrieving statistics, the most dominant exception as the most relied upon exception. In any case, those exceptions are applied strictly, as per the case law of the European Court of Justice.

Furthermore, the constant high rise in the number of applications observed since 2016, and their complexity has increasingly confronted the institution with the difficult challenge of reconciling the principle of transparency with the principle of efficiency and good administration. This is also why the statistics do not reflect the details on how the exceptions were applied and the number of documents requested or (partially) disclosed, which were far more numerous. Whereas applicants may ask for access to a single document, they more frequently request access to a multitude of documents, or even to entire files concerning a specific subject or procedure.

To conclude, the present annual report for the year 2019 brings a very detailed overview of the European Commission's broader transparency initiatives, the key trends and features of requests for access to documents submitted within the framework of Regulation (EC) No 1049/2001, as well as their corresponding replies from the institution and the rulings handed down by the European Courts, and the findings of the European Ombudsman concerning the European Commission's implementation of the Regulation.

### **Proactive publication of the European Commission's confirmatory decisions**

Currently, the European Commission publishes the confirmatory decisions on the Register of Commission Documents as metadata<sup>3</sup>, without the files themselves. Citizens can request access to confirmatory decisions via the Register of Commission Documents. Such requests will be dealt with as any other request for access to European Commission documents.

In 2021, the European Commission will take important steps to proactively deliver on its strong commitment to increased transparency and accountability, in order to further enhance the trust of European citizens in the processes of the institution.

Concretely, the European Commission works on its 'Electronic Access to Commission Documents system' which consists of two parts:

- a) Development of a new online portal through which applicants will be able to submit and have overview of their requests;

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<sup>3</sup> Metadata is information about the document such as date, author, type of document, etc.

- b) Development of a new IT system allowing the European Commission to handle requests for access to documents and communicate with the applicant.

Both parts are planned to go to production in the second quarter of 2021.

Among other improvements, the new system will allow the European Commission to publish the documents disclosed to the applicant, both at the initial and confirmatory stage. The disclosed documents will be published on the new online portal, along with their own set of metadata (title, identifier, type of disclosure, exception involved, etc.). This will allow the users to search for previously disclosed documents.

The European Commission is thus already actively working to achieve proactive disclosure of the European Commission's confirmatory decisions. It needs however to be highlighted that a careful assessment of each document is necessary to strike the right balance between transparency and public scrutiny, on the one hand, and the protection of personal data and other potentially sensitive information included in the decisions, on the other hand.

The European Commission can assure the European Ombudsman that it is constantly exploring new methods and measures to achieve enhanced transparency and that it will give a careful consideration to proactive publication of its confirmatory decisions in which the institution explains its reasoning for granting or (partially) refusing access to documents.

One of the challenges that the European Commission will need to solve in order to start proactively publishing confirmatory decisions concerns the personal data of the applicant (such as names, e-mail and postal address). According to the Commission procedural requirements, the contact details of the addressee of the decision need to be indicated on the first page of the decision.

*For the Commission*  
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