



EUROPEAN COMMISSION

Brussels, 3.7.2017  
C(2017) 4721 final

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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 2017/2732**

Dear Ms Maskell,

I refer to your email of 1 June 2017, registered on the same date, 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 8 May 2017, addressed to the Commission's Directorate-General for Energy (DG ENER), you requested access to *[a]ll communication, including emails, and documents (agenda, minutes, list of participants, etc.) related to the meetings listed on the Commissioners calendar between Maroš Šefčovič and Secretary General of the Energy Charter, Mr. Urban Rusnák, on the 10th of November 2014, the 27th February 2015, the 19th of February 2016 and on the 8th of January 2016 and to the meeting between Mr. Urban Rusnák and former EU Commissioner for Energy, Guenther Oettinger, on the 19th of June 2012, listed in the news from the Energy Charter Treaty.*

The Commission has identified the following documents as falling into the scope of your request:

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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. Letter dated 27 October 2014 from Mr. Urban Rusnák to Commissioner Šefčovič, ref.: Ares(2014)3695806,
2. Letter dated 12 November 2014 from Mr. Urban Rusnák to Vice-President Šefčovič, ref.: Ares(2014)3814329,
3. Letter dated 14 November 2014 from Mr. Urban Rusnák to Vice-President Šefčovič, ref.: Ares(2014)3895604,
4. Letter dated 17 December 2014 from Mr. Urban Rusnák to Vice-President Šefčovič, ref.: Ares(2014)4304817,
5. Letter dated 14 August 2015 from Mr. Urban Rusnák to Vice-President Šefčovič, ref.: Ares(2015)3426295,
6. Letter dated 11 December 2015 from Vice-President Šefčovič to Mr Paolo Gentiloni, Minister of Foreign Affairs and International Cooperation Ministry of Foreign Affairs and International Cooperation, ref.: Ares(2015)5819041,
7. Letter dated 9 May 2012 from Mr. Urban Rusnák to Commissioner Oettinger, ref.: Ares(2012)573916<sup>3</sup>.

On 1 June 2017, DG ENER granted full access to documents (1) – (6).

In your confirmatory application, submitted on the same day, you argue that the documents identified and released by DG ENER at the initial stage may not be the only ones held by the Commission and falling under the scope of your initial request. In particular, you point out that your initial request encompassed also such documents as *agendas, minutes, summaries, briefings and lists of participants*, which were neither identified nor released by DG ENER.

## **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 provided by the relevant service at the initial stage.

Following your confirmatory application, the Commission has carried out a renewed, thorough search of the documents in its possession. Based on this renewed search, the Commission identified one additional document, being a letter dated 9 May 2012 from Mr Rusnák to Commissioner Oettinger, with reference Ares(2012)573916 (document (7)).

Having examined the contents of this document, I am pleased to inform you that wide partial access is granted to it, with only limited information redacted on the basis of the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001.

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<sup>3</sup> Document (7) was identified only at the confirmatory stage.

With regard to other possible documents mentioned in your confirmatory application, I confirm that the Commission has not identified any documents held by it, other than documents (1) – (6) released by DG ENER at the initial stage and document (7) identified at the confirmatory stage, that would fall within the scope of your request.

## **2.1 Protection of privacy and the 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.*

Document (7) contains the handwritten signature of Mr Rusnák. This is personal data in the meaning of Article 2(a) of Regulation 45/2001<sup>4</sup>, 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 the above-mentioned 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>5</sup>, when a request is made for access to documents containing personal data, the 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>6</sup>.

Only if both conditions are fulfilled and 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>7</sup>.

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<sup>4</sup> 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.

<sup>5</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>6</sup> Ibid, paragraphs 77-78.

<sup>7</sup> Judgment of the Court of Justice of 16 July 2015 in case C-615/13P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:489), paragraph 47.

Indeed, in the recent judgment in the *ClientEarth* case, where 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>8</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>9</sup>.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Therefore, I have to conclude that the transfer of personal data through the full disclosure of document (7) 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. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(1)(b) of Regulation 1049/2001 is absolute exception, i.e. its applicability does not need to be balanced against overriding public interest in disclosure.

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

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*  
*Alexander ITALIANER*  
*Secretary-General*

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<sup>8</sup> Ibid, paragraph 47.

<sup>9</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.