



EUROPEAN COMMISSION

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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 2022/2408**

Dear Mr Sabido,

I refer to your email of 11 October 2022, registered on the same day, by which you lodge 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').

Please accept our apologies for the delay in handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 11 April 2022, addressed to the Directorate-General for Climate Action, you requested access to, I quote:

‘1- all correspondence (including email, SMS, private twitter and WhatsApp) since 1st February 2022 between Commissioner Timmermans, and/or his cabinet and/or officials from DG CLIMA with representatives from Wintershall, Uniper Fortum, OMV, RWE, TotalEnergies, ExxonMobil, Shell, BP, Equinor, Eni, Repsol, Galp in which the EU's response to Ukraine invasion, particularly the rePower communication was discussed.

2- any briefings prepared for Commissioner Timmermans, and/or his cabinet and/or officials from DG CLIMA for meetings since 1st February 2022 with representatives from Wintershall, Uniper Fortum, OMV, RWE, TotalEnergies,

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.05.2001, p. 43.

ExxonMobil, Shell, BP, Equinor, Eni, Repsol, Galp in which the EU's response to Ukraine invasion, particularly the rePower communication was discussed.

3 - list of meetings since since 1st February 2022 between Commissioner Timmermans, and/or his cabinet and/or officials from DG CLIMA with representatives from Wintershall, Uniper Fortum, OMV, RWE, TotalEnergies, ExxonMobil, Shell, BP, Equinor, Eni, Repsol, Galp in which the EU's response to Ukraine invasion, particularly the rePower communication was discussed.

4 - minutes of the meetings mentioned above.'

When an application for access to documents covers topics falling under the responsibility of different Commission services, such an application is split into separate requests, whereby each part is attributed to the respective Commission service under a separate reference number. Each service provides its own, separate reply, which relates only to the documents held by that service. In this regard, the present confirmatory decision concerns only the review of the initial reply of the Directorate-General for Climate Action of 18 July 2022, registered under reference number 2022/2408.

The Directorate-General for Climate Action identified the following documents as falling under the scope of your request:

- RWE and others, 5 May 2022, registered under reference number Ares(2022)3460591 (hereafter 'document 1');
- RWE and others, 5 May 2022, registered under reference number Ares(2022)3460591 (hereafter 'document 2').

In its initial reply of 18 July 2022, the Directorate-General for Climate Action:

- granted wide partial access to document 1 with the exception of some parts which were redacted based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- granted full access to document 2;
- with regard to point 3 of your initial application, referred you to the respective website, where you can find information on meetings of the Director-General of the Directorate-General for Climate Action with organisations and self-employed individuals, and informed you that the European Commission does not hold any documents that would correspond to the description given in your application.

In your confirmatory application, you question the absence of further documents.

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.

Against the background brought in your confirmatory application, the European Commission has carried out a renewed, thorough search for the documents requested.

Following this renewed search, the Secretariat-General has identified the following documents as falling under the scope of your request:

- Third joint industry letter on hydrogen & Delegated Act RED II – mail, 24 March 2022, registered under reference number Ares(2022)8767313 (hereafter ‘document 3’);
- Third joint industry letter on hydrogen & Delegated Act RED II – letter, 24 March 2022, registered under reference number Ares(2022)8767313 (hereafter ‘document 4’).

Following this review, I am pleased to inform you that:

- full access is given to document 4,
- wide partial access is given to document 3 with the exception of limited parts which are redacted based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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’.

In its judgment in Case C-28/08 P (*Bavarian Lager*)³, 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 data⁴ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’⁵. Likewise, in the *Psara* judgment, the General Court added that Article 4(1)(b) ‘establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public [...]’⁶.

³ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

⁴ Official Journal L 8, 12.1.2001, p. 1.

⁵ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁶ Judgment of 25 September 2018, *Maria Psara and Others v European Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraph 65.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁷ (hereafter ‘Regulation (EU) 2018/1725’).

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

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’⁸.

Document 3 contains personal data such as the names, functions, and contact details of natural persons external to the European Commission who are not public figures.

The names of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725⁹.

Pursuant to Article 9(1)(b) of Regulation (EU) 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) 2018/1725, can the transmission of personal data occur.

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 data¹⁰. 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.

⁷ OJ L 295, 21.11.2018, p. 39.

⁸ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹⁰ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

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 confirmatory 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 subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the document requested, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the withheld 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 the disclosure of the personal data concerned.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, partial access has been granted to document 3. No further partial access can be granted without undermining the interest protected by Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

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
Ilze JUHANSONE
Secretary-General

Enclosures: (2)