



EUROPEAN COMMISSION

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Oppenheim Law Firm
Károlyi u. 12
H-1053 Budapest
Hungary

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION NO (EC) NO 1049/2001¹

Subject: Your confirmatory application for access to documents under Regulation No (EC) No 1049/2001 - GESTDEM 2018/3547

Dear ■■■■■, ■■■■■,

I refer to your letter of 8 August 2018, registered on the same day, in 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 No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 27 June 2018, addressed to the Directorate-General for Energy, you requested access to:

1. '[...] detailed information about the exact amount of the subsidy factually paid ■■■■■ ■■■■■ (i.e. the cumulative payment);
2. [...] the documents certifying the factual cumulative payment having regard to the fact that data published and information provided to ■■■■■ by the European Commission are controversial;
3. [...] a detailed list of the officially accepted costs (detailed network investment calculation) and the finally accepted costs and provide access to the documents on the basis of which the European Commission found that ■■■■■. was eligible for the cumulative payment factually paid;

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

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

4. [...] detailed information about the exact amount finally not paid to [REDACTED] due to ineligibility of costs;
5. [...] a detailed list of the ineligible costs and [an explanation] why such costs were found ineligible by the European Commission.’

In its initial reply of 25 July 2018, the Directorate-General for Energy informed you that it would reply to your requests for information in accordance with the Code of Good Administrative Behaviour of the European Commission³. As regards your request for access to documents, the Directorate-General for Energy informed you that the European Commission does not hold any documents that would correspond to points 2, 4 and 5 of your request. The Directorate-General for Energy has identified the following documents as falling under the scope of your request under points 1 and 3:

- Payment letter and financial table, reference Ares(2011)1204373, (hereafter ‘document 1’);
- Final Technical Implementation Report and Financial Statement of 15 July 2011, reference Ares(2011)885272 (hereafter ‘document 2’).

In its initial reply of 25 July 2018, the Directorate-General for Energy refused access to these documents based on Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001.

In your confirmatory application, you requested a review of this position, alleging that ‘it has not been clearly explained why the public interest would be more at stake than if it were disclosed’. Additionally, you asked the European Commission ‘to check again whether all documents have been identified to which [you] referred’.

In your letter of 23 August 2018 to the European Commission, you clarified that ‘should the requested documents contain personal data [...], the application and the confirmatory application [shall be considered] as applications targeting documents in which personal data of the participants are redacted’. Consequently, all personal data contained in the requested documents fall out of the scope of this confirmatory application.

Your arguments concern the non-disclosure of documents 1 and 2 and the correct identification of all documents falling within the scope of your request. The confirmatory decision addresses these issues below.

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 fresh review of the reply given by the relevant Directorate-General at the initial stage.

³ Code of Good Administrative Behaviour for Staff of the European Commission in Their Relations with the Public, Official Journal L 267 of 20.10.2000, p. 64.

As a preliminary remark, I would like to clarify that the European Commission replies to requests for information according to the Code of Good Administrative Behaviour and not based on Regulation (EC) No 1049/2001. Your request for information contained in your confirmatory request has been forwarded to the Directorate-General for Energy for reply, as it cannot be addressed in the context of this confirmatory decision. The latter reviews the initial decision by the Directorate-General for Energy only as regards your request for access to documents.

In your confirmatory application, you asked the European Commission to ‘check again whether all documents have been identified to which [you] referred’. Please note that, according to Article 2(3) of Regulation (EC) No 1049/2001, ‘[t]his Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union’. Following your request, the European Commission conducted a new thorough search for documents other than the ones already identified as falling within the scope of this request. However, the European Commission does not hold any documents other than the ones already identified. Please note that the right of access only applies to documents in the possession of the institution.

In your confirmatory application, you request for the first time the Commission Decision C(2010)7510 of 5 November 2010. Please note that this part of your request is inadmissible, because the right to make a confirmatory application exists only in the event of a total or partial refusal of the institution to grant access to the requested document(s). As you did not request access to this document at the initial stage, you are not entitled to make a confirmatory application. In case you are still interested in this document, you are entitled to make an initial request.

In the context of this review, the Secretariat-General consulted the Hungarian and Romanian authorities, as well as the external auditor, on possible disclosure of the parts of document 2 that originate from them, in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001. The Hungarian and Romanian authorities agreed to the disclosure of the parts of document 2 originating from them, subject to the redactions of the personal data contained therein. The European Commission did not receive a reply from the external auditor.

Following this review, I can inform you that partial access is granted to documents 1 and 2, subject only to very limited redactions of commercially sensitive information.

The reasons for these redactions are set out below.

2.1. Protection of commercial interests

Article 4(2), first 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 commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure’.

The requested documents contain details of beneficiaries' bank accounts. This information is commercially sensitive, because its public disclosure would undermine the commercial interests of the beneficiaries. Indeed, the public disclosure of the bank account details would undermine the integrity of the financial operations of the beneficiaries. Consequently, the very limited parts reflecting this information are redacted, based on the exception of Article 4(2), first indent of Regulation (EC) No 1049/2001 (protection of commercial interests).

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first 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 indicate that 'the European Commission subsidized the construction of the interconnector from public funds. Hence, EU taxpayers (citizens and companies) have the right to know on what their money was spent. [REDACTED] is of the firm view that this is an overriding public interest'.

In this context, I would like to refer to the Case C-127/13 P (*Strack*)⁴, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to rely merely on that principle and its importance. An applicant has to show in a specific situation why the principle of transparency is in this case especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure⁵.

Such a pressing need has not been substantiated for the very limited withheld parts. While I understand that there could indeed be a public interest in the information about the promoters of Hungary–Romania gas interconnector, I consider that the interest of the public in being informed about the use of EU funds has been satisfied both by the publication of detailed information about the project and its funding and the partial disclosure of the requested documents.

I therefore conclude that the very limited redactions of bank account details are justified and that there is no public interest in disclosing this commercially sensitive information that would override the protection of the commercial interests of the beneficiaries under Article 4(2), first indent of Regulation (EC) No 1049/2001.

⁴ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, Case C-127/13 P, EU:C:2014:2250, paragraph 128.

⁵ *Ibid*, paragraph 129.

4. 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: (2)