



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 2018/4847**

Dear ██████████

I refer to your letter of 14 December 2018, registered on 25 January 2019, 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 (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 14 September 2018, addressed to the Directorate-General for Energy, you requested access to:

- ‘A list of all lobby meetings held by [the Directorate-General for Energy] Directorate B between 9 March 2018 and today where renewable gas was discussed. The list should include: date, Commission attendees, the name of the organisation(s) attending, who attended on their behalf, and a more precise topic if that exists.
- The minutes of all lobby meetings held by [the Directorate-General for Energy] Directorate B between 9 March 2018 and today renewable gas was discussed. This should also include any documents that were distributed at the meeting, and any presentations that were made.

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

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

- All correspondence, electronic or otherwise, between lobbyists and by [the Directorate-General for Energy] Directorate B between 9 March 2018 and today where renewable gas was discussed.’

The European Commission considered your request to cover documents drawn up to the date of your initial application of 14 September 2018 and identified the following documents as falling under the scope of your request:

- Presentation by National Grid on sector coupling, at a meeting on 12/04/2018, reference Ares(2018)5950880 (hereafter 'document 1');
- Presentation by [REDACTED] GRTgaz) to the Deputy Director-General of the Directorate-General for Energy of a study summary ‘A 100% renewable gas mix in 2050’, at a meeting on 19.07.2018, reference Ares(2018)5951109 (hereafter 'document 2');
- Presentation by GASAG on Berlin’s national gas storage facility, at a meeting on 29.08.2018, reference Ares(2018)5951383 (hereafter 'document 3').

In its initial reply of 3 December 2018, the Directorate-General for Energy gave full access to document 2 and partially refused access to documents 1 and 3, based on the exceptions of Article 4(2) first indent (protection of commercial interests, including intellectual property) and Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you requested a review of the decision of the Directorate-General for Energy as regards the absence of the requested list of meetings, as well as the absence of documents containing the minutes of the meetings and the correspondence exchanged in the context of those meetings. Therefore, the scope of this confirmatory review is limited to those issues. I note that you did not challenge the partial access granted at the initial level to documents 1 and 3.

You support your request with detailed arguments, which I address in the corresponding sections 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 review of the reply given by the Directorate-General concerned at the initial stage.

In your confirmatory application, you first contest the absence of the list of meetings. You indicate that in your previous application GESTDEM 2018/1235, such a list of meetings was provided. You also challenge the absence of any documents containing the minutes of those meetings, as well as the absence of the correspondence exchanged in the context of those meetings. You state that ‘the notes taken and then shared from those meetings [...] should be provided’ as well as ‘the emails asking for a meeting, confirming the meeting, thanking [...] for the meeting and attaching the presentations.’

Regarding your request for meeting minutes, I would like to point out that there is no legal obligation for the European Commission to draw up minutes of every meeting with interest representatives. In the present case, no minutes were established for the meetings concerned by your request.

As regards an updated list of lobby meetings, I have to confirm that such a document does not exist. As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. In its judgment in Case C-491/15 P (*Typke v Commission*³), the Court of Justice ruled that ‘an application for access that would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation [EC] No 1049/2001’.

As regards the correspondence exchanged in relation to the meetings concerned, I would like to underline that, according to Article 4 of Commission Decision 2002/47/EC, ECSC, Euratom⁴ of 23 January 2002 amending its Rules of Procedure, a document drawn up or received by the European Commission must only be registered if it contains important information that is not short-lived and/or may involve action or follow-up by the European Commission or one of its departments. An item of correspondence concerning meetings referring to logistical arrangements is indeed a short-lived document. Therefore, I confirm that the European Commission does not hold any such further documents containing correspondence as requested by you.

However, as part of this review, the European Commission has carried out a renewed, thorough search for possible documents falling under the scope of your request.

Based on this renewed search, the European Commission has identified the following documents:

- Email exchanges between the Directorate-General for Energy and representatives of National Grid, setting up the meeting of the 12.04.2018, reference Ares(2019)839205 (hereafter ‘document 4’)⁵;

³ Judgment of the Court of Justice of 11 January 2017, *Typke v Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

⁴ Official Journal L 21 of 24.1.2002, p. 23.

⁵ The attachment included in this email exchange was already partially released (as document 1) in the initial reply sent to you on 3.12.2018.

- Email exchanges between the Deputy Director-General of the Directorate-General for Energy and representatives of Hydrogen Europe, setting up a meeting on 12.03.2018, reference Ares(2019)850507 (hereafter ‘document 5’).

I would like to inform you that wide partial access is granted to documents 4 and 5, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

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*)⁶, 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 data⁷ (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 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/EC⁸ (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.

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’.⁹

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

⁶ 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.

⁷ Official Journal L 8 of 12.1.2001, p. 1.

⁸ Official Journal L 205 of 21.11.2018, p. 39.

⁹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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’.¹⁰

Documents 4 and 5 contain personal data such as the names, initials and contact details of staff members who do not form part of the senior management of the European Commission. They also contain names and contact details of representatives of third parties.

The names¹¹ 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) 2018/1725.

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 data.¹² 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.

¹⁰ 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.

¹¹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹² Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

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 documents, 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, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, 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 the disclosure of the personal data concerned.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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

4. PARTIAL ACCESS

As indicated above, wide partial access is granted to documents 4 and 5, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

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: (2)