



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 2018/5081**

Dear ██████████,

I refer to your email of 15 November 2018, registered on 19 November 2018, 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 26 September 2018, addressed to the Directorate-General for Climate Action, you requested access to '[a]ll documents, including but not limited to emails, instructions, and drafts, related to the [n]on-paper on Cars/Vans CO₂ Regulation proposal: Additional assessment of higher ambition levels for the targets and Z[ero] [and] L[ow] E[mission] V[ehicles] benchmarks'.

The European Commission has identified the following documents as falling under the scope of your application:

- Results of scenario 1 of the Primes-Tremove Transport model with projections for, among others, greenhouse gas emissions in road transport, final energy consumption in road transport and stock of vehicles (hereafter 'document 1');

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

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

- Results of scenario 2 of the Primes-Tremove Transport model (hereafter ‘document 2’);
- Results of scenario 3 of the Primes-Tremove Transport model (hereafter ‘document 3’);
- Results of scenario 4 of the Primes-Tremove Transport model: (hereafter ‘document 4’);
- Results of scenario 5 of the Primes-Tremove Transport model: (hereafter ‘document 5’);
- Results from the Econometric Energy-Environment-Economy Model³, with projections for, inter alia, economy-wide and sectorial Gross Domestic Product and employment (hereafter ‘document 6’);
- Results from the Econometric Energy-Environment-Economy Model, with projections for, inter alia, economy-wide and sectorial Gross Domestic Product and employment (hereafter ‘document 7’);
- Aggregated summary of payback analysis for the economic assessment of different options for CO₂ standards for cars post-2020 (hereafter ‘document 8’);
- Draft (version two) of non-paper entitled ‘Cars/Vans CO₂ Regulation proposal: Additional assessment of higher ambition levels for the targets and Zero and Low Emission Vehicles benchmarks’, reference: SP(2018)571/2 (hereafter ‘document 9’);
- Note to the Members of the Inter-institutional Relations Group (*Groupe des Relations Interinstitutionnelles*) relating to the meeting on 21 September 2018, reference SP(2018)571/1, (hereafter ‘document 10’);
- Draft (version one) of non-paper on Cars/Vans CO₂ Regulation proposal: Additional assessment of higher ambition levels for the targets and Zero and Low Emission Vehicles benchmarks, reference: SP(2018)571/1 (hereafter ‘document 11’);
- E-mail dated 20 September 2018 from and to the staff members of the Directorate-General for Climate Action (hereafter ‘document 12’), which includes the following annexes:
 - cover note (hereafter ‘document 12.1’),
 - the non-paper mentioned above (hereafter ‘document 12.2’),
 - note to the Members of the Inter-institutional Relations Group (*Groupe des Relations Interinstitutionnelles*), relating to the meeting on 21 September 2018, reference: Ares(2018)6260084 (hereafter ‘document 12.3’);

³ E3ME model.

- E-mail dated 20 September 2018 from and to the staff members of the Directorate-General for Climate Action, reference: Ares(2018)6260569 (hereafter ‘document 13), which includes the following annex:
 - draft version of the non-paper mentioned above (hereafter ‘document 13.1’),
 - cover note (hereafter ‘document 13.2’);
- E-mail from the Directorate-General for Climate Action to various services of the European Commission, dated 18 September 2018 and the reply of the Legal Service of the European Commission, dated 18 September 2018, reference: Ares(2018)6370943 (hereafter ‘document 14);
- E-mail from the Directorate-General for Climate Action to various services of the European Commission, dated 18 September 2018 and the reply of the Directorate-General for Environment, dated 18 September 2018 (hereafter ‘document 15), which includes the following annex:
 - the note to the Members of the Inter-institutional Relations Group (*Groupe des Relations Interinstitutionnelles*) (hereafter: document 15.1),
 - draft non-paper on Cars/Vans CO₂ Regulation proposal (hereafter ‘document 15.2)
 - note to the Members of the Inter-institutional Relations Group (*Groupe des Relations Interinstitutionnelles*) (hereafter ‘document 15.3) relating to the meeting on 21 September 2018 reference: Ares(2018)6370971;
- E-mail from the Directorate-General for Climate Action to various services of the European Commission, dated 18 September 2018 and the reply of the Directorate-General for Mobility and Transport, dated 19 September 2018, reference: Ares(2018)6370765 (hereafter ‘document 16)⁴.

In its initial reply of 13 November 2018, the Directorate-General for Climate Action refused access to the above-mentioned documents, based on the exception in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 (protection of the decision-making process). Additionally, with regard to documents 1 to 8, the Directorate-General for Climate Action underlined that they originate from a third party and their public disclosure would not be in line with confidentiality clauses deriving from the relevant contractual arrangement with that third party.

In your confirmatory application, you request a review of this position.

⁴ Document 13.1 is the same as document 9. Document 13.2 is the same as document 12.1. Document 12.3 is the same as document 10 and 12.2 is the same as document 11. Consequently, this decision refers only to one of the documents. The underlying reasoning, however, applies to its identical versions.

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 relevant Directorate-General at the initial stage.

Following my review, I would like to inform you that:

- Full access is granted to documents 1 to 8, 9 (13.1), 11 (12.2) and 12.1 (13.2).
Your initial application relates only to the non-paper and consequently, the relevant parts of documents 1 to 8, which contains data not used in the preparation of that non-paper, were redacted as falling outside the scope of your application.
- wide partial access is granted to documents 10 (12.3), 12 and 13 with personal data redacted, based on the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001.
- Partial access is granted to document 15.1 with the relevant parts redacted, based on the exceptions protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001 and the decision-making process laid down in Article 4(3) of the above-mentioned regulation.
- Partial access is granted to document 15.2 with the relevant parts redacted, based on the exception protecting the decision-making process laid down in Article 4(3) of the above-mentioned regulation.
- Additionally, in case of documents 10 (12.3) and 15.1, the relevant parts not relating to the non-paper were redacted as falling outside the scope of your application. Indeed, the relevant parts of document 10 (12.3) and 15.1, as well as the whole document 15.3 provide an update on the state of play in the Council and the European Parliament on the proposal of the European Commission for the Regulation setting emission performance standards for new passenger cars and for new light commercial vehicles as part of the Union's integrated approach to reduce CO₂ emissions from light-duty vehicles.

With regard to the remaining documents, that is, documents 14, 15 and 16, I confirm the position of the Directorate-General for Climate Action refusing access thereto, based on the exception protecting the decision-making process provided for in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

The detailed reasons are set out below.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘the 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*)⁵, the Court of Justice ruled that when an application 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 data⁶ ('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) No 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 ('Regulation (EU) No 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 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'.⁸

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.⁹

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'.⁹

The relevant undisclosed parts of documents 10 (12.3), 12, 13 and 15.1 contain the names and contact details (telephone numbers) of staff who do not hold any senior management position.

The names¹⁰ 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 2(a) of Regulation (EU) No 2018/1725.

⁵ 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.

⁶ Official Journal L 8 of 12.1.2001, p. 1.

⁷ Official Journal L 205 of 21.11.2018, p. 39.

⁸ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 59.

⁹ Judgment of the Court of Justice of 20 May 2003, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁰ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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) No 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 of its own motion the existence of a need for transferring personal data.¹¹ This is also clear from Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, the European Commission has to examine the further conditions for a 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 subject’s 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 disclosure of the personal data concerned.

¹¹ 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.

2.2 Protection of the decision-making process

Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 provides that ‘[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure’.

Article 4(3), second subparagraph, of the said regulation provides that ‘[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure’.

Documents 14, 15, 16 and the relevant undisclosed parts of documents 15.1 and 15.2 contain comments provided by various services of the European Commission during the internal consultation phase leading to the adoption of concerning the non-paper entitled ‘Cars/Vans CO₂ Regulation proposal: Additional assessment of higher ambition levels for the targets and Zero and Low Emission Vehicles benchmarks’. The non-paper was prepared in the context of the ongoing decision-making process relating to the adoption by the European Parliament and the Council of a Regulation setting emission performance standards for new passenger cars and for new light commercial vehicles as part of the Union's integrated approach to reduce CO₂ emissions from light-duty vehicles. The European Commission made public the final version of the non-paper¹² and the proposal of the above-mentioned regulation¹³.

The decision-making process leading up to the adoption of the regulation is composed of two consecutive stages that are concluded, respectively, by:

1. The adoption by the European Commission of the proposal for the legislative act and submission of the proposal to the co-legislators (the European Parliament and the Council);
2. The interinstitutional decision-making process aiming at the actual adoption of the legislative act by the European Parliament and the Council.

On 8 November 2017, the European Commission adopted the proposal for the above-mentioned regulation¹⁴, thus concluding the first stage of the process. The decision-making process can, however, not be seen as completed, insofar as the European Commission is also involved in the subsequent, interinstitutional stage of the process, which is still ongoing.

This involvement encompasses explaining and defending the proposal at working level in the Council (Council working party) and in the relevant committees of the European Parliament. The proposal is also being discussed in the context of *trilogue* meetings (the

¹² https://ec.europ.eu/clima/sites/clima/files/transport/vehicles/docs/non_paper_co2_proposal_en.pdf.

¹³ <http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-676-F1-EN-MAIN-PART-1.PDF>.

¹⁴ COM(2017)676.

last took place on 4 December 2018). The European Commission can alter its proposal at any time during the legislative procedure, as long as the Council has not acted (Article 293(2) of the Treaty on Functioning of the EU). Therefore, I consider that the decision-making powers of the European Commission are not exhausted at this stage, and that the decision-making process has not yet been finalised.

Document 15 and the relevant undisclosed parts of documents 15.1 and 15.2 therefore reflect the internal discussions within the services of the European Commission before the finalisation of the above-mentioned non-paper.

The disclosure of these discussions would undermine the protection of the decision-making process of the European Commission, as it would reveal preliminary views and assessments that are still relevant in the course of the ongoing decision-making process.

In this context, the premature disclosure of the information included in documents 14, 15, 16 and the relevant undisclosed parts of documents 15.1 and 15.2 containing the technical assessment concerning policy options and the preliminary opinions for internal use would seriously undermine the margin of manoeuvre of the European Commission in exploring, in the framework of the ongoing decision-making process, all possible policy options free from external pressure. As such, it would also seriously undermine its capacity to propose and promote compromises between the co-legislators. The fact that the issues under discussion attract a lot of attention and that the documents requested contain strategic elements that the European Commission will use in its exchanges with the European Parliament and the Council only reinforces this conclusion.

Based on the above, I conclude that documents 14, 15, 16 and the relevant undisclosed parts of documents 15.1 and 15.2 cannot be disclosed pursuant to Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001, as disclosure thereof would specifically and actually result in serious harm to the ongoing decision-making process protected by that provision.

If the decision-making process were nevertheless considered to be closed following the adoption of the proposal of the European Commission and the publication of the non-paper, which, as explained above, is not the case, I consider, in the alternative, that the refused parts of the documents would nevertheless be covered by the exception provided for in Article 4(3), second subparagraph, of the said regulation, for similar reasons to those set out above.

Indeed, disclosing those documents, reflecting opinions for internal use as part of preliminary deliberations regarding the revision of the telecommunications framework, would seriously harm the (future) decision-making process of the European Commission as regards the adoption of the regulation setting emission performance standards for new passenger cars and for new light commercial vehicles, including – but not limited to – the interinstitutional decision-making process aiming at the eventual adoption of the legislative act.

In your confirmatory application, you referred to another application for access to documents¹⁵, where the European Commission ‘released several papers which provided preliminary views and policy options that were prepared in relation to the [European] Commission Notice of 26 September 2017 on the application of EU food and consumer protection law [...]’. Consequently, in your view, ‘[t]he fact that the [European] Commission was then able to release those documents, revealing preliminary views and policy options, showed that there was no risk to the decision-making process’.

In this regard, it needs to be underlined that when handling every application for access to documents, the European Commission carries out an individual assessment of the case, including examination of the documents falling under its scope. In the case at hand, the European Commission considers that the public disclosure of the (parts of) the documents in question would indeed undermine the decision-making process, as explained above. The fact that in another case, relating to a different subject matter, the European Commission released certain documents (possibility of similar type) may not be considered as a factor determining the outcome of the assessment of other cases.

Against this background, I consider that documents 14, 15, 16 and the relevant undisclosed parts of documents 15.1 and 15.2 need to be protected against the risks associated with public disclosure under the exception provided for under Article 4(3), first and second subparagraphs of Regulation (EC) No 1049/2001.

3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents to which access was refused at the initial stage.

Following your confirmatory application, full access is now granted to documents 1 to 8, 9 (13.1), 11 (12.2) and 12.1 (13.2) and (wide) partial access is hereby granted to documents 10 (12.3), 12, 13, 15.1 and 15.2.

With regard to the remaining documents, to which access is refused in entirety, meaningful partial access is not possible, given that the withheld information included therein is covered in its entirety by the exception provided for in Article 4(3), first and second subparagraphs, of Regulation (EC) No 1049/2001.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) 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 the confirmatory application, you indicate that ‘[t]he non-paper in question has been published a week before the European Parliament voted on the [European] Commission’s

¹⁵ Gestdem 2018/148.

proposal. The rapporteur in charge of [...] the file [...] has said the non-paper contained “misleading figures”. Consequently, in your view, in order to ‘set the record straight for the public, it would be imperative for the public to determine the preparatory work leading up to the paper’.

I consider your reasoning to mean that, in your view, there is an overriding public interest in the disclosure of the documents concerned, based on an alleged general need for transparency, allowing for public scrutiny of the decision-making process relating to the approval of the non-paper in question.

I would like to refer in this regard to the judgment in the *Strack* case¹⁶, 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 merely rely on that principle and its importance, but that an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹⁷.

In my view, such a pressing need has not been substantiated in this case. While I appreciate that there is public interest regarding this subject matter, I consider that the need for full transparency does not outweigh in this case the need to protect the documents concerned pursuant to the exception relating to the decision-making process.

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: 16

¹⁶ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission* (hereafter referred to as ‘*Strack v Commission* judgment’), C-127/13 P, EU:C:2014:2250, paragraph 128.

¹⁷ *Strack v Commission* judgment quoted above, paragraph 129.