



EUROPEAN COMMISSION

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C(2022) 7566 final

Mr Peter Teffer
Ekko Voorkamer
Bemuurde Weerd WZ 3
3513 BH Utrecht
Netherlands

**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 2022/1730**

Dear Mr Teffer,

I refer to your e-mail of 21 June 2022, registered on the following 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 (hereinafter ‘Regulation (EC) No 1049/2001’).

Please excuse our delay in replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 22 March 2022, registered on 24 March and addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission, you requested access to, I quote:

‘documents containing the following information:

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

1. *Background note of the Legal Service of 22 January 2019 (document reference Ares (2019)2632727)*
2. *Note of the Legal Service of 19 February 2019 to the Directors General of DG GROW (document reference Ares (2019) 1023442)*
3. *Revised background note of the Legal Service of 20 February 2019 (document reference Ares (2019) 3139320).*
4. *Commission Decision C(2019)1640 final, including draft version(s)'.*

In your initial application, you also recalled that you had already applied for access to the same documents in the past (application of 5 March 2019, registered under reference GESTDEM 2019/1258) and been denied it by the European Commission, on the grounds of the exception to the right of access laid down in the second indent of Article 4(2) (protection of court proceedings) of Regulation (EC) No 1049/2001. You specified, however, that the court proceedings to which the documents concerned relate, as invoked by the European Commission in its negative reply to that application, have now come to a close, rendering that exception to the right of access inadmissible.

Please note that upon registration of your initial application at hand, due to its subject matter, its processing was attributed to the Legal Service of the European Commission.

In its reply to your initial application, dated 30 May 2022, the Legal Service informed you that it had identified the following five documents held by the European Commission and corresponding to the description of documents requested:

- Background note of the Legal Service of 22 January 2019 (document reference Ares(2019)2632727) (hereinafter ‘document 1’);
- Note of the Legal Service of 19 February 2019 to the Director-General of Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Directorate-General for Environment and Directorate-General for Climate Action (document reference Ares(2019)1023442) (hereinafter ‘document 2’);
- Annex to the above-mentioned note, constituting a Draft Commission decision on the submission of an appeal before the Court of Justice (document reference Ares(2019)1023442) (hereinafter ‘document 3’);
- Background note of the Legal Service of 20 February 2019 (document reference Ares(2019)3139320) (hereinafter ‘document 4’); and
- Commission Decision of 22 February 2019 on the submission of an appeal before the Court of Justice (document reference C(2019)1640 final) (hereinafter ‘document 5’).

Subsequently, the Legal Service referred to your previous application concerning the same documents, as indicated above, whereby access to these documents had been fully denied based on the exception to the right of access laid down in Article 4(2), second indent (protection of court proceedings) of Regulation (EC) No 1049/2001.

Finally, as regards your renewed initial application for access to the documents concerned, which has led to the confirmatory application at issue, the Legal Service explained to you that further to a new assessment of the documents, access thereto had to be denied again, based on the same exception to the right of access, as laid down in Article 4(2), second indent (protection of court proceedings) of Regulation (EC) No 1049/2001 and a general presumption of non-disclosure.

In your confirmatory application, you request a review of this position. You support your request with substantive arguments which are addressed 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 of the European Commission conducts a review of the reply issued by the institution's service concerned at the initial stage.

Following this review, I regret to inform you that public access to the documents requested must be denied on the grounds of the exceptions to the right of access laid down in the following provisions of Regulation (EC) No 1049/2001:

- Article 4(1)(b) (protection of privacy and the integrity of the individual) – applicable to document 2; and
- Article 4(2), second indent (protection of court proceedings and legal advice) – applicable to documents 1-5.

The detailed reasons underpinning this assessment 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 '[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)

³ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59.

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 (hereinafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that as of 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/EC⁵ (hereinafter ‘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’⁶.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’ and, 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’⁷.

Please note that document 2 contains names, surnames, and a handwritten signature of staff members of the European Commission not holding a senior management position, from which their identity can be deduced.

As per settled case-law, such information undoubtedly constitutes personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725⁸.

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

⁴ OJ L 8, 12.1.2001, p. 1.

⁵ OJ L 295, 21.11.2018, p. 39.

⁶ *European Commission v Bavarian Lager Co. Ltd* judgment, cited above, paragraph 59.

⁷ 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.

⁸ Judgment of the General Court of 19 September 2018, *Port de Brest v Commission*, T-39/17, EU:T:2018:560, paragraph 43.

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 data⁹.

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.

Since the need to obtain access to the personal data concerned for a purpose in the public interest has not been substantiated in your application and there is no reason to think that the legitimate interests of the individual concerned would not be prejudiced by its disclosure, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data withheld.

2.2. Protection of the court proceedings and legal advice

The second indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] court proceedings and legal advice [...] unless there is an overriding public interest in disclosure’.

In its judgment in Case T-84/03 (*Turco*), the Court of First Instance¹⁰ found that the exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 protects two distinct interests, namely court proceedings and legal advice¹¹. In the present case, this exception applies to both interests protected, insofar as all the documents requested

⁹ 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.

¹⁰ Now the General Court.

¹¹ Judgment of the Court of First Instance of 23 November 2004, *Maurizio Turco v Council*, T-84/03, EU:T:2004:339, paragraph 65.

relate to the court proceedings, while documents 1 and 4 contain also elements concerning legal advice.

In its recent judgment in Case T-485/18 (*Compañía de Tranvías de la Coruña*), the General Court specified that the protection of court proceedings ‘requires, in particular, that the principle of equality of arms is observed and that the sound administration of justice and the integrity of court proceedings are guaranteed’¹². As found by the General Court in its earlier judgment in Case T-851/16 (*Access Info Europe*), the integrity of the court proceedings concerned and the equality of arms between the parties could be seriously compromised if the parties were to benefit from privileged access to documents¹³.

In this regard, it must be stressed that, according to the General Court’s above-mentioned judgment in Case T-485/18, ‘[t]he second indent of Article 4(2) of Regulation [(EC)] No 1049/2001 also precludes the disclosure of documents that were not drawn up solely for the purposes of specific court proceedings, but whose disclosure is liable, in the context of specific proceedings, to compromise the principle of equality of arms [on a condition that] those documents [...] have a relevant link either with a dispute pending before the Courts of the European Union, in respect of which the institution concerned is invoking that exception, or with proceedings pending before a national court, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely’¹⁴.

Finally, please note that it may still be possible to invoke the exception to the right of access laid down in Article 4(2), second indent of Regulation (EC) No 1049/2001 with respect to documents related to closed court proceedings, where release of the institution’s arguments might undermine its position in other proceedings¹⁵.

Last, but not least, the General Court confirmed that such other court proceedings do not necessarily have to be already pending at the time of the adoption of the decision denying public access to the documents requested, but it is sufficient that they are potential but imminent¹⁶.

As explained to you by the Legal Service in its reply to your initial application, the documents requested contain the European Commission’s internal assessment of the

¹² Judgement of the General Court of 6 February 2020, *Compañía de Tranvías de la Coruña, SA v European Commission*, T-485/18, EU:T:2020:35, paragraph 38.

¹³ Judgment of the General Court of 7 February 2018, *Access Info Europe v European Commission*, T-851/16, EU:T:2018:69, paragraph 72.

¹⁴ *Compañía de Tranvías de la Coruña, SA v European Commission* judgment, quoted above, paragraph 42.

¹⁵ Judgment of the Court of Justice of 21 September 2010 in case C-514/07 P, *Sweden and Others v API and Commission*, EU:C:2010:541, paragraph 132.

¹⁶ *Compañía de Tranvías de la Coruña, SA v European Commission* judgment, quoted above, paragraph 42; judgments of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraphs 88 to 90, and of 15 September 2016, *Philip Morris v Commission*, T-18/15, EU:T:2016:487, paragraphs 64 and 65.

judgment of the General Court in Joined Cases T-339/16, T-352/16 and T-391/16¹⁷, rendered on 13 December 2018 and partially annulling the Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6)¹⁸.

More specifically, documents 1 and 4 are background notes containing an internal legal analysis of that judgment, carried out by the Legal Service with a view to a possible appeal against it before the Court of Justice. Those notes were addressed to the Cabinet of the President of the European Commission, and they include recommendations by the Legal Service as regards possible course of procedural action to be taken by the European Commission as a party to the court proceedings concerned. Document 2 is the Legal Service's note to the Directors-General of Directorate-General for Climate Action, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and Directorate-General for the Environment, transmitting the draft Commission decision on the submitting of an appeal against the judgment. Finally, documents 3 and 5 are, respectively, the above-mentioned draft Commission decision and the final Commission decision to lodge an appeal against the judgment before the Court of Justice. It must be recalled that these documents contain the Commission's legal position on the subject matter of the judgment and arguments supporting the appeal, dealing with the substantive legal issues related to the validity of the contested regulation.

Indeed, the above-mentioned judgment of the General Court in Joined Cases T-339/16, T-352/16 and T-391/16 was subjected to three appeals which included the one brought by the European Commission (Case C-179/19 P), as well as two others submitted by the Federal Republic of Germany (Case C-177/19 P) and Hungary (Case C-178/19 P). On 13 January 2022, the Court of Justice rendered its judgment in those three joined cases¹⁹, which effectively concluded the judicial review of the contested regulation in the framework of that specific court proceedings.

Nevertheless, as explained to you by the Legal Service in its reply to your initial application, even though the Court of Justice set aside the General Court's judgment under appeal, dismissing the actions for annulment brought by the applicants as inadmissible, it did not rule on the findings of the General Court by which it declared that the European Commission did not have the power to adopt the contested regulation.

Consequently, despite the conclusion of the court proceedings to which the documents requested pertain, there are persisting substantive legal issues related to the validity of the contested regulation, which have not been adjudicated by the Court of Justice. Therefore, the Secretariat-General recognises the existence of a strong incentive for new judicial

¹⁷ Judgement of the General Court of 13 December 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v European Commission*, Joined Cases T-339/16, T-352/16 and T-391/16, ECLI:EU:T:2018:927.

¹⁸ OJ 2016 L 109, p. 1.

¹⁹ Judgement of the Court of Justice of 13 January 2022, *Federal Republic of Germany and Others v European Commission*, Joined Cases C-177/19 P, C-178/19 P and C-179/19 P, ECLI:EU:C:2022:10.

proceedings on the subject matter to be initiated in the near future, most notably as a result of actions brought before national courts, leading to subsequent requests for a preliminary ruling by the Court of Justice on the validity of the contested regulation.

It follows that due to the high probability of imminent opening of such court proceedings, it is very likely that the European Commission will be asked to submit written observations in those future proceedings. Understandably, they are expected to deal with the same subject matter as the proceedings to which the documents requested pertain, namely the validity of the contested regulation.

Since the rationale of the exception protecting court proceedings is the equality of arms between the parties, the documents requested, containing the legal assessment of the substantive legal issues at stake, cannot be publicly disclosed, as this argumentation will be relevant for future court proceedings, which are very probable to occur in the near future. At this stage, public disclosure of those documents, which contain internal positions of a legal nature, issued by the Commission services, on contentious issues²⁰, would affect in a concrete manner the ability of the Legal Service to effectively defend the European Commission before the Union courts.

Against this background, the Secretariat-General concludes that public disclosure of the documents requested would upset the principles of sound administration of justice and the equality of arms, which are at the core of the interests protected by virtue of Article 4(2), second indent of Regulation (EC) No 1049/2001 and which form its rationale²¹.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions to the right of access laid down in Article 4(2) 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of access to the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal²².

²⁰ Judgment of the General Court of 28 September 2022, *Päivi Leino-Sandberg v European Parliament*, T-421/17 RENV, paragraph 50.

²¹ Judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 85.

²² Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5

In your confirmatory application, you submit that, I quote:

‘[t]he rule of law in our European democracy is one of the fundamental values of the European Union. Its importance is reflected in the fact that the respect for the rule of law is included in the second article of the Treaty on European Union.

The European Commission is tasked with ensuring that Member States uphold the rule of law. In that context, it is paramount that the Commission itself correctly follows legal procedures and adopts legislation in a way that is in line with the treaties. It should go without saying that it is in the public interest that when the Commission adopts regulations, this is done in line with EU law. This is why the initial judgment of the General Court of 13 December 2018 was so important: it established that the Commission was wrong to use comitology to adopt this regulation.

If the public has reason to believe that the Commission can ignore EU law when adopting regulations, this can greatly undermine the public’s trust in the EU. It is thus important for journalists such as [yourself] to establish the arguments of the Commission’s Legal Service and reaction to this judgment. This public interest is far greater than the Commission’s desire to keep the documents confidential.’

Please note that such general considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question²³.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness²⁴, provides further support to this conclusion.

In this respect, it must be also stressed that even though the General Court has recognised that the presumption of openness also applies to legal advice issued by the European Commission’s Legal Service in the context of a legislative process²⁵, this does not preclude a refusal of public access to a specific legal opinion, especially where the advice concerns a matter of a particularly sensitive nature²⁶.

December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

²³ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

²⁴ *European Commission v Bavarian Lager Co. Ltd* judgment, cited above, paragraphs 56-57 and 63.

²⁵ Judgment of the General Court of 15 September 2016, *Philip Morris Ltd v European Commission*, Case T-796/14, EU:T:2016:486, paragraphs 56 and 61.

²⁶ *Ibid.*, paragraph 62.

Consequently, the Secretariat-General concludes that in your confirmatory application, you did not put forward any arguments demonstrating the existence of an overriding public interest in disclosure of the documents requested, nor was the Secretariat-General able to identify any such arguments while assessing your confirmatory application.

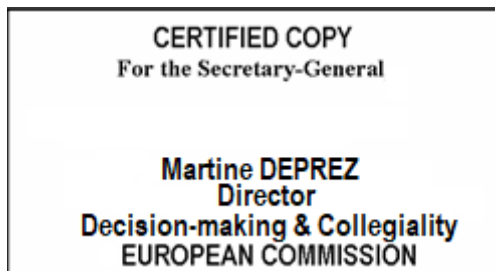
4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, no partial access is possible without undermining the interests described above.

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 in, respectively, Article 263 and Article 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Ilze JUHANSONE
Secretary-General