



EUROPEAN COMMISSION

Brussels, 9.1.2024
C(2024) 233 final

Mr Matteo Civillini

**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 – EASE 2023/4406**

Dear Mr Civillini,

I refer to your email of 15 September 2023, 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 replying to your confirmatory request.

1. SCOPE OF YOUR REQUEST

In your initial application of 27 July 2023, registered on the same day, you requested access to, I quote, '[a]ny document - including, but not limited to, minutes, transcripts, decisions, reports and/or any form of correspondence - concerning renewable/green hydrogen in Namibia since October 2022. In particular, on 20/05/2023 President von der Leyen said: "In Namibia, we are providing guarantees for private investments in green hydrogen". Please provide any document (including but not limited to agreements, contracts, reports, assessments) concerning the abovementioned "guarantees for private investments in green hydrogen" in Namibia mentioned by the President.' The case, under reference EASE 2023/4406, was attributed to the Secretariat-General of the European Commission.

On 13 September 2023, Directorate D of the Secretariat-General informed you that it was not able to identify any documents as falling within the scope of your request.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

In your confirmatory application, you request a review of this position as, in your view, there should be more documents falling within the scope of your request. You take the view that the absence of any documents is, I quote, ‘highly implausible to believe ... unless you are taking an unfairly narrow interpretation of my request. Just as an example, as stated in my request, on 20/05/2023 President von der Leyen said: “In Namibia, we are providing guarantees for private investments in green hydrogen”. I find it impossible to believe that such statement was made in the absence of any briefing document (or any other type of document) that at the very least the Commission should have considered as part of my application. The same goes with the statement given by the President when the MoU with Namibia was launched in November 2022.’

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 at the initial stage.

Please note that your present request is addressed to the Secretariat-General of the Commission. The scope of review of an initial reply is restricted to the scope of the application made at the initial level, equally addressed to the Secretariat-General of the Commission.

In this regard, the Secretariat-General would like to note that in two previous requests for access to documents, you have similarly requested ‘[a]ny document - including, but not limited to, minutes, transcripts, decisions, reports and/or any form of correspondence - concerning renewable/green hydrogen in Namibia since October 2022’, in requests attributed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (EASE 2023/4404) and, respectively, the Directorate-General for International Partnerships in a case split with the European External Action Service (EASE 2023/4507). In both cases, you have been provided with Commission documents identified by the respective services that cover, in an extensive manner, the first part of your present request, equally referring to ‘[a]ny document - including, but not limited to, minutes, transcripts, decisions, reports and/or any form of correspondence - concerning renewable/green hydrogen in Namibia since October 2022.’

Therefore, the Secretariat-General considers that the first part of your request has been answered by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (EASE 2023/4404) and the Directorate-General for International Partnerships (EASE 2023/4507) respectively, both not subject to the current confirmatory request. Therefore, please note that the present confirmatory decision is circumscribed to the review of the initial decision provided by the Secretariat-General and, consequently, focuses on your request for, I quote, ‘[i]n particular, on 20/05/2023 President von der Leyen said: “In Namibia, we are providing guarantees for private investments in green hydrogen”. Please provide any document (including but not limited to agreements, contracts, reports, assessments) concerning the abovementioned “guarantees for private investments in green hydrogen” in Namibia mentioned by the President.’

Against this background, the European Commission has carried out a new, thorough search for the documents requested. Following this renewed search, the Secretariat-General confirms that it does not hold any documents that would correspond to the description given in your application.

Indeed, 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.

The Secretariat-General would like to refer in this respect to the judgment of the Court of Justice in Case C-127/13 P (*Strack v European Commission*), according to which ‘[n]either Article 11 of Regulation 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist’³.

The above-mentioned conclusion has been confirmed in Case C-491/15 P (*Typke v European Commission*), where the Court of Justice held that ‘the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned and [...] Regulation No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist. It follows 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 No 1049/2001’⁴.

Furthermore, the General Court held in Case T-468/16 (*Verein Deutsche Sprache v Commission*) that there exists a presumption of lawfulness attached to the declaration by the institution asserting that documents do not exist⁵. This presumption continues to apply unless the applicant can rebut it by relevant and consistent evidence⁶. The Court of Justice, ruling on an appeal in Case C-440/18 P, has confirmed these conclusions⁷.

In your confirmatory application, you do not provide any evidence that the institution is in possession of any further documents corresponding to the description provided in your application. As regards your argument that ‘it is highly implausible to believe that [the Commission does not hold any documents corresponding to the description in your application],’ please note that the General Court held in Case T-468/16 (*Verein Deutsche Sprache v Commission*) that a mere suspicion that there must be more documents does not suffice to put in question the presumption of legality of the institution’s statement⁸.

³ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

⁴ Judgment of the Court of Justice of 11 January 2017, *Typke v European Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

⁵ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

⁶ *Ibid.*

⁷ Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18 P, ECLI:EU:C:2019:77, paragraph 14.

⁸ *Verein Deutsche Sprache v Commission* judgment, cited above, paragraph 37.

Given that the Secretariat-General does not hold any such documents corresponding to the description given in your application, it is not in a position to fulfil your request.

3. 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

