



EUROPEAN COMMISSION

Secretariat-General

Directorate C – Transparency, Efficiency & Resources

The Director

Brussels
SG.C.1/TB

By registered mail with AR

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Subject: Your application for access to documents – GESTDEM 2021/0012

Dear Mr Fanta,

I refer to your e-mail of 1 January 2021, registered on 4 January 2021, in which you make a request for access to documents, under the above-mentioned reference number. Please accept our apologies for the late reply to your request.

1. SCOPE OF YOUR REQUEST

You request access to, I quote:

‘All text message exchanges between President Ursula von der Leyen and German Chancellor Angela Merkel since the former assumed office in late 2019. The existence of such exchanges has recently been reported in the press [1]. My request should also include other exchanges using text and instant messaging, such as via WhatsApp, iMessage, Signal, etc.’

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001

We regret to inform you that the Commission does not hold any documents that would correspond to the description given in your application.

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.

Article 2(3) of Regulation (EC) No 1049/2001 provides, in particular, that ‘[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’.

Indeed, the Commission’s definition of document to be registered is independent of the medium in which the information is held. This is in line with the concept of ‘document’ developed by the European Court of Justice: ‘the [data in question] within the meaning of Article 1(2) of Directive 96/9 exhibits the two essential characteristics of a document within the meaning of Article 3(a) of Decision 2004/258 [now Regulation (EC) No 1049/2001], since it constitutes content stored in a medium.’¹

However, as it was also observed by the Court, the institution is not generally obliged to preserve each and every document: ‘[i]t should be recalled that, although Regulation No 1049/2001 is applicable even when [...] the institution concerned no longer has the document to which access is requested and that the latter must answer the applicant and justify before the judge its refusal of access on this basis, the said regulation cannot oblige an institution to give access to a document which it no longer has.’²

Therefore, the Commission applies certain principles when registering documents. Please note that as set out in Article 7(1) of Commission Decision of 6.7.2020 on records management and archives³, ‘[d]ocuments shall be registered if they contain important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments’.

Accordingly, whether a document is considered a record or not depends on whether the information is relevant to any of the Commission’s policies, is important and not short-lived. An SMS or another type of instant messaging is by its nature short-lived and informal. Thus, an SMS or another type of instant messaging might qualify as a record only in very exceptional circumstances. Within the scope of your request, the Commission did not experience any such event that would have justified the application of its record-keeping policy to instant messaging. The Commission therefore does not hold any document conforming to your access request.

Given that no such documents, corresponding to the description given in your application, are held by the Commission, the Commission is not in a position to fulfil your request.

3. MEANS OF REDRESS

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

¹ Judgment of the General Court of 22 October 2011, *Dufour v ECB*, T-436/09, paragraph 103.

² Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, paragraph 66.

³ https://ec.europa.eu/info/sites/info/files/c_2020_4482_en.pdf

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission

Secretariat-General

Unit C.1. 'Transparency, Document Management and Access to Documents'

BERL 7/076

B-1049 Brussels,

or by email to: sg-acc-doc@ec.europa.eu.

Yours sincerely,

Tatjana Verrier
Director