

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 16 March 2023, the applicant submitted two applications for public access to documents under Regulation (EC) No 1049/2001¹ (references EASE 2023/1665 and EASE 2023/1666). The requests concerned documents that contain information related to the meeting of the former EU Commissioner Günther Oettinger, during the period from 1 January 2014 until his departure from the European Commission in November 2019, with the former CFO of Wirecard AG, as well as other representatives of Wirecard AG, Wirecard Bank or affiliated companies.

The application was handled at the initial stage by the European Commission's Directorate-General for Communications Networks, Content and Technology, which identified six relevant documents and:

- partially disclosed five documents based on the exceptions laid down in Article 4(1)(b) (protection of privacy and the privacy of the individual) and the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001; and
- fully protected one document entitled 'Agenda: Wirecard Bank AG: Meeting with Günther Oettinger, European Commissioner for Digital Economy and Society, 19 January 2015, 13:00-13:30', reference Ares(2015)436265 (hereafter 'the requested agenda'), based on the exceptions laid down in the second indent (protection of legal advice) of Article 4(2) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001, taking into account the opposition of the third party author of the document.

In relation to this document, the Directorate-General for Communications Networks, Content and Technology had consulted, in accordance with Article 4(4) of the same regulation, its author under a previous request for public access², in the context of which the third party explicitly objected to its disclosure based on the lawyer-client privilege of confidentiality in the terms of the 'provision of legal advice'.

On 7 May 2023, the applicant submitted a confirmatory application against the non-disclosure of the requested document (reference Ares(2015)436265).

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

In his complaint, the applicant argued that the Commission failed to take a decision on his confirmatory request within the applicable time limit under Regulation (EC) No 1049/2001.

¹ OJ L 145, 31.5.2001, p. 43.

² Reference GESTDEM 2021/0566.

III. EUROPEAN OMBUDSMAN'S INQUIRY AND THE PROPOSAL FOR A SOLUTION

The European Ombudsman opened an inquiry into the Commission's alleged failure to reply to the confirmatory application by the extended time limit. In the course of the inquiry, the European Ombudsman's services inspected the document at issue in addition to the related third-party consultations, including the reply of the third party in the previous, related request (GESTDEM 2021/0566).

In the course of the inquiry, the Commission informed the Ombudsman that the assessment of the applicant's confirmatory request was ongoing and that a consultation with the third-party concerned could be considered in the context of the present case if the conditions under Article 4(4) of Regulation (EC) No 1049/2001 were met.

Despite the Commission's ongoing assessment of the applicant's request and its confirmation that it would adopt a final decision on the request, the Ombudsman issued, on 4 August 2023, a proposal to seek a solution in this case. In its proposal, the Ombudsman considers that the document is not covered by any exception set out in Regulation (EC) No 1049/2001 and hence the Commission is not obliged to consult the third party and must disclose the document directly. The Ombudsman took the view that the Commission should review 'its initial position on the complainant's public access request with a view to granting the widest possible access to the agenda'.

IV. THE REPLY OF THE EUROPEAN COMMISSION

The assessment performed at confirmatory stage by the Secretariat-General shows that the document requested can be partially disclosed, despite the negative position of the third party, which, following a renewed consultation of the third party at the confirmatory stage in accordance with Article 4(4) of Regulation (EC) No 1049/2001, opposed any partial disclosure of the document. In reaching such conclusion, the Commission duly examined the arguments provided by the third party in response to the consultation of the Commission at the confirmatory level and the arguments provided by the applicant in his application.

On this basis, the Commission decided to grant partial access to the document subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the privacy of the individual) of Regulation (EC) No 1049/2001 and the identity of the law firm pursuant to the first indent (protection of the commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001. The personal data in the documents has been redacted in accordance with Article 4(1)(b) of Regulation (EC) No 1049/2001, as well as all references to the law firm, in order not to be impinging on the lawyer/client privilege. Therefore, this information is protected in accordance with the exception provided for in the first indent (protection of the commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001.

In order to avoid any irreversible action that could result from the disclosure of the document and to preserve the right of the third party to resort to the effective legal remedies at its disposal, the Commission gave the third party, in accordance with Article 5(5) and (6) of the Detailed rules of application of Regulation (EC) No 1049/2001³, a period of ten working days to inform the Commission whether it would object to the disclosure using the remedies

³ OJ L 345, 29.12.2001, p. 94.

available to it, i.e., an application for annulment and an application for interim measures before the General Court in accordance with Article 263 TFEU.

As the third party did not signal its intention to avail itself of the legal remedies available, including of a request for interim relief to suspend the operation of the Commission's decision to disclose the document, and an action for annulment against the decision, the Commission sent the confirmatory decision, together with its annexes to the applicant on 6 February 2024.

V. CONCLUSION

The Commission's confirmatory decision, registered under number Ares(2024)400872, grants partial access to the agenda subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the privacy of the individual) of Regulation (EC) No 1049/2001 and the identity of the law firm pursuant to the first indent (protection of the commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001 and despite the opposition of the third party to any partial disclosure of the document both at initial and confirmatory stages.

Therefore, the Commission decided to grant the widest possible access to the document concerned.

For the Commission
Věra JOUROVÁ
Vice-President