



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B5/MKu/MM/psi – Ares(2011)

Ms Natacha Cingotti
Friends of the Earth Europe

By e-mail only to:
natacha.cingotti@foeeurope.org

Subject: Your confirmatory application under Regulation (EC) 1049/2001 for access to documents - GESTDEM No 2011/2579

Dear Ms Cingotti,

I refer to your email of 27 July 2011 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 documents¹.

I also refer to the letter of 22 August 2011 from my services by which the time limit for replying to your requests was extended. I would like to apologise for the delay in answering your request and for any inconvenience this may have caused.

1. SCOPE OF YOUR REQUEST

In your abovementioned letter, you request a review of the position taken by the Secretariat-General on 6 July 2011, in its answer to your initial request of 12 May 2011. In your initial request, you asked for access to:

- *"the copies of all the documents related to the exchanges between the European Commission and British Petroleum (BP) regarding the calculation of BP's lobby registration, including all correspondences held by the Secretariat General with BP's representatives, agendas and minutes of every meeting held between the two parties, and in respect to the calculation of BP's lobby registration and that support the argument that the registration of BP is correct.*
- *the copies of all the documents related to the exchanges between the European Commission and Royal Dutch Shell (Shell) regarding the calculation of Shell's lobby registration, including all correspondences held by the Secretariat General with Shell's representatives, and agendas and minutes of every meeting held between the two parties, and in respect to the calculation of Shell's lobby registration and that support the argument that the registration of Shell is correct."*

¹ OJ L145, 31.05.2001, p. 43.

In its reply of 6 July 2011, the Secretariat-General has identified the following parts of documents as falling under your request:

- (1) Minutes of the informational meeting with BP on 28 October 2010: page one except the first part before "Remarks on BP's calculations..." and page two except the first and fourth bullet points under "Remarks on the complaint...";
- (2) An internal note containing the analysis of the complaint made by Friends of the Earth Europe on 27 July 2010 with regard to British Petroleum: page one except the content of the box; page two: only the second, fifth, sixth and seventh paragraph under "Examination of the complaint"; page three: only the first three paragraphs; page four: only the fifth and seventh paragraph; page five: only the third paragraph; none of pages 6 to 8;
- (3) E-Mail from BP of 5 November 2011, except the first paragraph, the first three bullet points and the last paragraph of the email text;
- (4) Minutes of the informational meeting with Royal Dutch Shell on 21 October 2010: page one except the first part before "Remarks on the complaint...", page two fully, page three except the fifth bullet point;
- (5) An internal note containing the analysis of the complaint made by Friends of the Earth Europe on 27 July 2010 with regard to Royal Dutch Shell: page one except the content of the box; page two: only the second, fifth, sixth and seventh paragraph under "Examination of the complaint"; page three: fully except the last three paragraphs and the footnote; page four: only the third and the last paragraph; page five: only the first paragraph and the first part of the antepenultimate paragraph; none of pages 6 to 13;
- (6) E-mail from Royal Dutch Shell of 25 October 2010, except the first paragraph of the email text on page one and its last paragraph on page three.

To these parts of documents as defined above under (1) to (6) (hereunder referred to as "document (1)" to "document (6)"), the Secretariat-General has granted partial access, excluding the following elements:

- in document (1): deletion of the name of a BP representative in the last paragraph on page one as well as in five locations on page two; deletion of a percentage value in the penultimate bullet point and of the names of BP memberships in the last bullet point on page two;
- in document (2): deletion of a percentage value in the last paragraph on page two and of names of BP memberships in the paragraph starting with "Furthermore" on page four;
- in document (3): deletion of sender and addressee in the header of the email, of the address as well as of the signature and the footer;
- in document (4): deletion of the name of a Shell representative in the penultimate bullet point and in the footnote on page one; deletion of budget sum, numbers and functions of Shell employees in the first bullet point, of details of consultancy fees in the second bullet point and of percentage values and figures of consultancy fees in the third bullet point on page two; deletion of names of Shell representatives in the antepenultimate and in the last bullet point on page two; deletion of an object of former Shell sponsorship in the penultimate bullet point on page two; deletion

of memberships in the first paragraph on page three; deletion of an activity in the third, fourth and fifth paragraph and of names of medias in the fourth and fifth paragraph on page three; deletion of numbers of employees and access badges on the last two paragraphs on page three;

- in document (5): deletion of the name of a Shell representative in the penultimate paragraph on page two; deletion of budget sum, number and functions of Shell employees in the last paragraph on page two; deletion of details of consultancy fees in the second paragraph on page three; deletion of percentage values and figures of consultancy fees in the third paragraph on page three; deletion of numbers of employees in the paragraph starting with "In addition" on page four; deletion of an activity and of names of medias in the last paragraph on page four;
- in document (6): deletion of sender and addressee in the header of the email and of the address; deletion of budget sum, numbers and functions of Shell employees in the second bullet point, of details of consultancy fees in the third bullet point and of percentage values and figures of consultancy fees in the fourth bullet point on page one; deletion of memberships under 2) and of an activity and of names of medias under 3) on page two; deletion of the signature and of the footer on page three.

In your confirmatory application, you maintain your initial request.

2. EXAMINATION AND CONCLUSIONS

Having examined your request and the documents concerned, I have come to the conclusion that a larger partial access can be provided to documents (1), (2) and (4) to (6) as follows:

- in document (1): disclosure of names of BP memberships in the last bullet point on page two;
- in the document (2): disclosure of names of BP memberships in the paragraph starting with "Furthermore" on page four;
- in document (4): disclosure of the deletion in the penultimate paragraph on page two and of all deletions on page three except those in the first paragraph;
- in document (5): disclosure of all deletions in page four;
- in document (6): disclosure of all deletions under point 3) on page two.

In consequence, I can grant access to documents (1), (2) and (4) to (6) excluding the following elements:

- in document (1): deletion of the name of a BP representative in the last paragraph on page one as well as in five locations on page 2; deletion of a percentage value in the penultimate bullet point on page two;
- in document (2): deletion of a percentage value in the last paragraph on page two;

- in document (4): deletion of the name of a Shell representative in the penultimate bullet point and in the footnote on page 1; deletion of budget sum, numbers and functions of Shell employees in the first bullet point, of details of consultancy fees in the second bullet point and of percentage values and figures of consultancy fees in the third bullet point on page 2; deletion of names of Shell representatives in the antepenultimate and in the last bullet point on page 2; deletion of memberships in the first paragraph on page 3;
- in document (5): deletion of the name of a Shell representative in the penultimate paragraph on page 2; deletion of budget sum, number and functions of Shell employees in the last paragraph on page 2; deletion of details of consultancy fees in the second paragraph on page 3; deletion of percentage values and figures of consultancy fees in the third paragraph on page 3;
- in document (6): deletion of sender and addressee in the header of the email and of the address; deletion of budget sum, numbers and functions of Shell employees in the second bullet point, of details of consultancy fees in the third bullet point and of percentage values and figures of consultancy fees in the fourth bullet point on page one; deletion of memberships under 2) on page two and of signature and footer on page three.

Concerning document (3), the partial refusal by the Secretariat-General has to be confirmed. The reasons for refusing access to parts of the requested documents are set out below.

3. PROTECTION OF COMMERCIAL INTERESTS

3.1. Consultation of third parties

The two companies concerned, BP and Shell, have been consulted at the initial stage of the reply on the disclosure of the information they have submitted. Both of them have opposed disclosure of certain elements, namely:

- BP opposed disclosure of the percentage value which appears in the penultimate bullet point on page 2 of document (1) as well as in the last paragraph on page two of document (2);
- Shell opposed the disclosure of the first bullet point, the listing of consultancy fees in the second bullet point and the second sentence of the third bullet point on page 2, as well as of the last bullet point on end of page 2/beginning of page 3 of document (4);
- Shell also opposed disclosure of the second part of the last paragraph on page 2/ beginning of page 3, starting from "which was", of the listing of consultancy fees after the second paragraph as well as of the last sentence of the following paragraph on page 3 of document (5);
- in document (6), Shell opposed disclosure of the second bullet point, of the listing of consultancy fees in the third bullet point and of the second sentence of the fourth bullet point on page 1 as well as of the second and third sentence under point 2) on page 2.

BP justified its opposition with the consideration that the percentage value was commercially sensitive information with respect to other companies and associations engaged in a comparable activity and that, therefore, it fell under the exception of the protection of commercial interests under Article 4 (2), first indent of Regulation 1049/2001.

Shell argued that disclosure of the parts of the documents concerned would undermine the protection of its commercial interests. Concerning figures of budget and personnel in Brussels, Shell underlined that it did not disclose the amount spent on its activities in Brussels for competition and privacy reasons. This amount contained sensitive information of a confidential nature, including payment of rent and salaries.

Concerning the listing of consultancy fees paid, Shell observed that it contained detailed information on membership fees of various organisations and fees paid to consultancies. For competition reasons and reasons of commercial confidentiality, Shell requested not to disclose this section.

3.2. The Commission's own assessment

Having examined the documents at issue, as well as the replies of the companies concerned, I have to conclude that the disclosure of some parts of the requested documents would undermine the commercial interests of these companies. Indeed, some parts of the documents contain amounts and percentage values of money spent on interest representation and other activities in Brussels and the number of staff including the breakdown into different functions as well as membership in industry associations and fees paid to associations as well as to consultancies.

The parts that have been deleted in the expunged versions to which access is granted, are the following:

- document (1): deletion of the percentage value in the fourth bullet point on page two;
- document (2): deletion of the percentage value in the last paragraph on page two;
- document (4): deletion of budget sum, numbers and functions of Shell employees in the first bullet point, of details of consultancy fees in the second bullet point and of percentage values and figures of consultancy fees in the third bullet point on page 2; deletion of memberships in the first paragraph on page 3;
- in document (5): deletion of budget sum, number and functions of Shell employees in the last paragraph on page 2; deletion of details of consultancy fees in the second paragraph on page 3; deletion of percentage values and figures of consultancy fees in the third paragraph on page 3;
- in document (6): deletion of budget sum, numbers and functions of Shell employees in the second bullet point, of details of consultancy fees in the third bullet point and of percentage values and figures of consultancy fees in the fourth bullet point on page 1; deletion of memberships under 2) on page two.

Transparency on the level of expenditure engaged by registrants on activities falling within the scope of the Register is ensured by setting this information within a bracket of expenditure. However, disclosing the exact amount of money spent on such activities as well as the number of staff, including the breakdown into different functions, would reveal commercially relevant information.

The same holds true for membership in industry associations and fees paid to associations as well as to consultancies.

Disclosure of these elements would put the companies concerned in a disadvantaged position compared to their competitors, thus undermining their commercial interests.

It follows from the above that access to these parts of the documents requested has to be refused on the basis of the exception laid down in Article 4 (2), first indent of Regulation 1049/2001, which stipulates that "*The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property*".

4. PROTECTION OF PRIVACY AND INTEGRITY OF THE INDIVIDUAL

Names and other personal data such as email addresses and telephone numbers of BP and Shell employees and of Commission officials have been deleted at the following places:

- document (1): deletion of the name of a BP representative in the last paragraph on page 1 as well as in five locations on page 2;
- document (3): deletion of the sender and addressee in the header of the email, of the address as well as of the signature and the footer;
- document (4): deletion of the name of a Shell representative in the penultimate bullet point and in the footnote on page 1; deletion of names of Shell representatives in the antepenultimate and in the last bullet point on page 2;
- document (5): deletion of the name of a Shell representative in the penultimate paragraph on page 2;
- document (6): deletion of sender and addressee in the header of the email, of the address, of the signature and of the footer.

These names, email addresses and personal telephone numbers are personal data as defined in Article 2(a) of 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 data² (hereafter: Regulation 45/2001).

The Court of Justice has confirmed that "*where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation 45/2001 become applicable in their entirety, including Articles 8 and 18*

² OJ L 8 of 12.1.2001, p. 1.

thereof³. Pursuant to Regulation 45/2001, personal data must be processed fairly and lawfully. Any processing must be necessary for a specific purpose and proportionate to this purpose. Furthermore, pursuant to Article 8(b) of Regulation 45/2001, the Commission can only transmit personal data to a recipient subject to Directive 95/46/EC if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

You have not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be publicly disclosed. Furthermore, I cannot exclude that disclosure of these personal data would prejudice the data subjects' legitimate interests.

For these reasons, access has to be refused to the names, email addresses and telephone numbers of BP and Shell employees and of Commission officials pursuant to Article 4(1)(b) of Regulation 1049/2001.

5. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Article 4(2), first indent of the Regulation must be waived if there is an overriding public interest in disclosure. Please note that this only applies to those elements which are covered by this exception (see above under 3.), but not to the elements which are covered by the exception aimed at protecting privacy and the integrity of the individual (point 4.).

In order for an overriding interest to exist, it has to be public and it has to outweigh the interest to be protected under Article 4 of the Regulation.

In your confirmatory application, you considered that disclosure was necessary in the interest of transparency on interest representatives. In particular, you consider that the disclosure of the documents was necessary to enable the Transparency Register to be a relevant and reliable tool for information about lobbying activities, actors and resources dedicated to these activities. You expressed doubts about the Commission's own investigation, regretting in particular that the Commission did accept Shell's and BP's line to exclude such costs.

While I fully subscribe to the aim of transparency concerning the activities of representing interests to EU institutions, I consider that it is best pursued by respecting the companies' request for non-disclosure of their commercially sensitive information. As I have already pointed out above under point 3.2., the Commission Register of Interest Representatives (now Transparency Register) is based on voluntary registration and obliges organisations and undertakings willing to register to comply with certain rules, which are common for all registered organisations. It is for the Commission to verify the respect of these rules and to sanction possible breaches. It follows from this logic that organisations are only obliged to provide publicly the information as stipulated in the rules of the Transparency Register and can expect the Commission to respect confidentiality concerning all other data exchanged. In the present case, following a complaint, the Commission has investigated and concluded that there was no breach of

³ Paragraph 63 of the aforementioned *Bavarian Lager* judgement.

the rules of the Register. Your request aims at publication of additional information provided by BP and Shell in the course of this investigation, which is not part of the information that has to be provided by virtue of the rules of the Register. In consequence, such disclosure, following an unfounded complaint, and against the express opposition of the companies concerned, would unduly put these companies in a disadvantageous position as compared to other companies registered, which is clearly in contradiction with the rules of this Register. It is obvious that by doing so, the Commission would not favour further voluntary registration, but rather discourage organisations from registering. Therefore, I consider that disclosure would compromise the interest of transparency rather than pursuing it.

In consequence, I can see no public interest that would outweigh the interests of BP and Shell in the protection of their commercial interests and the interest of the protection of the purpose of the Commission's investigations.

6. MEANS OF REDRESS

I draw your attention to the means of redress available against this decision as far as it refuses access to parts of the requested documents. 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 TFEU.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Catherine Day', with a large checkmark-like flourish at the end.

Catherine Day

Annexes (5)