Philippe Dusser
Secretary General
European Oilseed Alliance
CS 60003
11 rue de Monceau
75008 Paris
sg@e-o-a.org

CATHERINE DAY
SECRETARY GENERAL
EUROPEAN COMMISSION
TRANSPARENCY UNIT SG-B-4
BERL 5/327
B-1049 BRUSSELS

sg-acc-doc@ec.europa.eu

Brussels, April 23rd 2014

Subject: Confirmatory application for public access to documents under Regulation 1049/2001 - ref GestDEM 2014/1538

Dear Mrs Day,

On March 19th, I made a new application for access to certain documents under Regulation No 1049/2001 in light of new and substantial facts subsequent to an initial refusal to disclose by the Commission. For ease of reference, a copy of this application is attached to the present letter.[1]

On April 10th, I received a letter from DG CLIMA refusing access to the "*draft impact assessments on ILUC and related documents*"[2] requested on the basis of the first indent of Article 4(3) of the Regulation.

I respectfully disagree with DG CLIMA's position for refusing access to the above-mentioned documents on the basis of the first indent of Article 4(3) of Regulation No. 1049/2001, all the more so since DG CLIMA completely overlooked my plea relating to the existence of new and substantial facts which should have led to the review of the earlier decision not to grant access to those documents.

Thus in accordance with Article 7(2) of Regulation No. 1049/2001, I respectfully submit this confirmatory application to ask you to reconsider the position of the Commission vis-à-vis these documents, in the light of the arguments provided below.

[1] As **Annex 1**.
[2] Commission response to my request for public access to documents. Ref. Ares(2014)1082604, attached as **Annex 2**.

1. DG CLIMA FAILED TO ADDRESS THE PLEA RELATING TO THE EXISTENCE OF NEW AND SUBSTANTIAL FACTS SUBSEQUENT TO THE INITIAL REFUSAL

DG CLIMA completely overlooked my point concerning the existence of new and substantial facts subsequent to my initial request for access to documents number 1 to 8, which rendered the justifications put forward for the refusal unfounded and should have led to the review of the earlier decision not to grant access to these documents.

Its reply is limited to the following statement :

> *None of the documents originating from other Commission services are of the same nature as the documents you are now requesting. Therefore I do not see any new elements in your request.*

Such an unsubstantiated statement is insufficient to discharge the burden of proof incumbent on the Commission in the case of an access to documents request. Furthermore such statement is simply incorrect in the face of the evidence stemming from the documents sent by the Commission (namely the JRC) in connection to my request Gestdem 2014/1798.

It derives clearly from the documents sent to us by the JRC (and previously disclosed to other applicants) that a number of internal opinions given in the course of inter-service consultations on the ILUC text to be adopted by the Commission have been disclosed on the basis of Regulation 1049/2001 (e.g. JRC's reply dated 20/09/2012 to the inter-service consultation launched by DG ENER-CLIMA on the Commission ILUC proposal; Note for the file drawn up by the JRC on 10th October 2012 etc.).

These documents which reflect exchanges of views as well as the evolution of discussions among the Commission's services on the text to be adopted must be taken to fall in the category of internal consultations and deliberations in the same way as the documents for which access is requested - draft impact assessments and staff working documents.

In that sense, it is indisputable that they are of the same nature, and must be treated identically in the course of an access to documents request.

Since the internal opinions expressed by the JRC were not considered to fall under the exception laid down in article 4(3) first indent of the Regulation nor to seriously undermine the Union and Commission's decision-making process concerning the ILUC proposal, the same must apply to the documents subject to the present access to documents application. Thus the Commission cannot validly invoke such an exception to refuse disclosure, when it waived it in the case of other internal consultations and deliberations concerning the same legislative proposal.

Therefore, we ask and trust the Secretariat General, as guardian of the Access to documents procedure to review DG CLIMA's answer so as to ensure consistency of Commission's answers in this respect. Would the same type of request be treated differently, depending on which service of the Commission answers or to which applicant it answers, it would result in

an impermissible and unjustifiable double standard and would thus violate the EU general principle of equal treatment.

2. THE DOCUMENTS REQUESTED ARE NOT COVERED BY THE EXCEPTION LAID DOWN IN ARTICLE 4(3) FIRST INDENT

DG CLIMA has refused access to these documents pursuant to the first indent of Article 4(3) of Regulation No. 1049/2001 which states that:

"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure." (emphasis added)

After carefully examining DG CLIMA's response to my initial request, I would like to present my arguments below that the first indent of Article 4(3) does not apply in the case of these documents.

2.1 Article 4(3) first indent applies only where the decision has not been taken by the institution concerned by the access to documents request

First, under the first indent of this Article, access to documents is protected only "*related to a matter where the decision has not been taken by the institution…*". In this case, a decision has clearly already been taken considering that a legislative *proposal for amending the existing Renewable Energy and Fuel Quality Directives* has already been adopted by a decision of the Commission - the relevant "institution" for the purpose of the above-mentioned request for access to documents - and submitted to the Council and the European Parliament on 17 October 2012.[3]

The Commission's own Rules of Procedure[4] expressly acknowledge that the decision taken by the College of Commissioners prior to the publication of any legislative proposal constitutes a "Commission decision."[5] (emphasis added)

The fact that the legislative proposal adopted by the Commission was then passed on to the other institutions for them to decide on it, is without prejudice to the finding that a "decision" has been taken by the former - sole institution concerned by this access to documents request (emphasis added).

It is reminded that the purpose of Regulation No. 1049/2001 being to give the public the widest possible right of access, the exceptions to that right set out in Article 4 must be

[3] Proposal for a directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, dated 17th October 2012, COM(2012) 595 final.

[4] Rules of Procedure of the Commission C(2000)3614, OJ L 308, 8.12.2000, p. 26

[5] Reference is made to article 4 of the above-mentioned Rules of Procedure, which explicitly refers to "Commission decisions". (emphasis added)

interpreted and applied strictly.[6] Furthermore, the same rules of interpretation apply to the wording of the different provisions of Article 4.

Thus DG CLIMA's assertion according to which as long as the proposal is being considered by the two branches of the EU legislator and until it is finally adopted, no decision should be considered as having been taken by the institution [to be understood: Commission], simply distorts the literal meaning of article 4(3) first indent.

Indeed, the Commission is a distinct institution from the Parliament and the Council as expressly stated in Article 13 of the Treaty on the European Union, and the wording of article 4(3) cannot be construed so as to extend the meaning of the term "institution" to comprise all the institutions involved in a legislative procedure.

Any other interpretation would run counter to the underlying objective of the Regulation which is to ensure the widest possible access to documents as recognized by the Court of Justice, and which can only be achieved by a strict interpretation of any exceptions to that right.

Last but not least, the fact that the JRC has disclosed its contribution to DG CLIMA inter-service consultations to other applicants and subsequently to us clearly demonstrates - if needed - that Article 4(3) cannot be opposed to such a request.

Therefore I respectfully submit, in light of the above, that DG CLIMA has misconstrued Article 4(3), first indent, by applying it to a case where a Commission decision has already been taken and where documents preparing this decision have already been disclosed.

2.2 Article 4(3) first indent applies only to documents that seriously undermine the Commission's decision-making process

Second, even if it is considered that the Commission has not taken a decision, *quod non*, it is submitted that DG CLIMA has failed to establish to the requisite legal and factual standard that disclosure of the requested documents would seriously undermine the institution's decision-making process as required by the above-mentioned article. (emphasis added)

Indeed, according to established case-law, the institution relying on Article 4(3) to refuse access to certain documents, must prove that the disclosure of those documents is likely to specifically and actually undermine its decision-making process and that this risk must be reasonably foreseeable and not just purely hypothetical.[7] (emphasis added)

DG CLIMA's response received on April 10th fails to meet the burden of proof required by the above-mentioned case-law, as it relies on mere (general and abstract) assertions that are in no way substantiated by detailed arguments.

Such is the case for example of its statement that "*the disclosure would lead to external interference*". No evidence whatsoever is adduced to prove the reality of such an external

[6] Case C-64/05 P Sweden v. Commission [2007] ECR I-11389, paragraph 66.

[7] Cases T-2/03 Verein für Konsumenteninformation v. Commission [2005] ECR II-1121 paragraph 69, & T-144/05 Pablo Muniz v. Commission [2008] 2008 ECR II-00335.

pressure. Therefore, based on the case-law, the risk advanced is merely hypothetical.[8] The fact that interservice documents had been disclosed by the Commission (JRC) to Euractiv or NGOs also shows that this risk does not exist, except if the Commission would consider that it can choose which applicants are creating interferences and which ones are not.

Similarly, DG CLIMA's other contention that "*disclosure of these early reflections would interfere with the Commission's internal deliberations*", is also hypothetical or even misleading as these internal deliberations based on the impact assessment have already taken place well before the proposal was adopted by the Commission.

Therefore, it appears from the above considerations that DG CLIMA has failed to prove, as required by Article 4(3), that the disclosure of the documents requested would seriously undermine the Commission's decision-making process.

Moreover, I here refer to the evidence submitted in my initial application based on the new and substantial facts unveiled by the European press, according to which the Commission had granted public access to similar type of documents drawn up by the JRC - internal opinions of the Commission on the ILUC proposal - and considered that their disclosure did not pose any serious threats to the Union and Commission's decision-making process. All the more reason to consider that the Commission can simply no longer apply the exception laid down in article 4(3) to refuse to disclose the requested documents.

2.3 The "overriding public interest" waiver for article 4(3) first indent should have been applied to waive the exception

Third, DG CLIMA argues that it could not identify any overriding public interest under which the exception described in the first indent of Article 4(3) could be waived. Without prejudice to our argument that DG CLIMA has not correctly interpreted the first indent of Article 4(3), we believe that according to the applicable regulation and case-law DG CLIMA has not sufficiently met its burden to analyze possible overriding public interest issues in relation to this request for public access to documents.

In its letter, DG CLIMA pointed out simply that we did not "*mention any possible overriding public interest that would outweigh the protection of the decision-making process and [they] cannot see any overriding public interest either.*"[9] However, I believe that the regulation and case law regarding public access requires a more detailed explanation and reasoning from the Commission if it intends to argue that there is no "overriding public interest". In *Joined Cases C-39/05 P and C-52-05 P Sweden and Turco v. Council*, the European Court of Justice ("ECJ") specifically wrote with regard to the Article 4(2) exception for legal documents, "*it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined.*"[10]

Specifically, where the European institutions are acting in a legislative capacity, Regulation No. 1049/2001 places an even stronger burden on the institutions to justify refusing a request

[8] Case T-144/05 cited above, paragraphs 86 to 91.
[9] DG CLIMA response to my request for public access to documents pg 3.
[10] *Joined Cases C-39/05 P and C-52/05 P Kingdom of Sweden and Maurizio Turco v. Council of the European Union* para. 44.

for public access to documents as noted in recital 6 of the preamble[11]. As the ECJ further noted in the *Sweden and Turco v. Council* judgment, "*these considerations are of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases.*"[12]

Thus it is clear in applying these principles to responding to my public request for documents DG CLIMA has not met its burden to sufficiently explain why the "overriding public interest" provision of Article 4(3) should not apply to waive the exception in the first indent. As clearly stated in the case-law such an analysis is the responsibility of the European institutions, including the Commission and not the applicant. Accordingly, I believe that DG CLIMA has inappropriately relied on the non-application of this provision to decline the request to access to documents.

In addition and independent of whether DG CLIMA has sufficiently addressed any "overriding public interest", strong legitimate public interest reasons exist which would warrant waiving the exception laid out in Article 4(3). For example, without prejudice to other public interest considerations, the Commission failed to explicitly examine whether the release of the documents is supported by the goals of "increased openness" as described in recital 2 of the preamble of Regulation No. 1049/2001. In *Sweden and Turco v. Council*, the ECJ wrote in particular that a public interest supporting the release of documents under this Regulation is increased openness. In particular it "*enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.*"[13] This is especially critical where the Commission is acting in a legislative capacity.

In this case, DG CLIMA rejected access primarily to documents which contain previous drafts of the Impact Assessment and related documents. According to the regulation and case law on public access to documents, DG CLIMA should have recognized or at least addressed that access to such documents is necessary and even critical to the transparency of the legislative process. By having access to these documents, citizens would be able to review all the relevant information forming the basis of the legislative action and have a clearer understanding of the considerations underpinning the Commission's action. Such an interest supports public disclosure of these documents.

It is even more legitimate in the context of a legislative proposal which i) is radically modifying previous EU policy regarding biofuels thus potentially affecting legitimate expectations and ii) is relying on a limited number of scientific sources which are still being debated among the relevant academic and scientific institutions. The debate around the lack of scientific evidence has been key during the legislative process and the lack of transparency in this respect is one of the reasons explaining why the legislator could not find an agreement.

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[11] "*Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers (…).*"

[12] Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* para. 46.

[13] Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* para. 45.

Thus any lack of transparency in this respect can only affect - and has in fact clearly affected - the capability of both the European Parliament and the Council to take the appropriate decision - or even any decision-, i.e. a decision which would serve EU general interest and be legally sustainable.

It must be added, that the Commission's decision to refuse access to these drafts of the impact assessments is at odds with its own statements on the EU governance website suggesting that all impact assessments and all opinions of the Impact Assessment Board are to be published to ensure accountability and transparency in the legislative process.[14]

Furthermore, I would like to add that the Commission has committed to provide an even wider access to environmental information, by enacting Regulation No 1367/2006, and this Regulation provides that "grounds for refusal shall be interpreted in a restrictive way".

Therefore, we ask and trust the Secretariat General, as guardian of the Access to documents procedure to review DG CLIMA's answer so as to ensure consistency of Commission's policy in this respect.

3. PARTIAL ACCESS TO DOCUMENTS REQUESTED

As a last point, I note that the Commission rejected granting partial access to the documents requested under Article 4(6) of the Regulation No. 1049/2001 without substantiating its reasons for doing so.

It should be recalled that in *Case T-439/08 Kalliope v. Commission*, the Court held that a concrete and individual assessment is necessary to enable the relevant institution to decide on whether partial access can be granted to a document requested.[15] Applying the case law to our current request, we do not believe the Commission has sufficiently considered whether access to parts of each individual document can be granted under Article 4(6). Furthermore, the principle of proportionality requires derogations to remain within the limits of what is appropriate and necessary for achieving the aim in view.[16]

In the present case, DG CLIMA seems not to have met its burden to sufficiently explain its refusal to grant partial access to the documents in relation to the proportionality principle of EU law.

Therefore, we ask and trust the Secretariat General, as guardian of the Access to documents procedure to review DG CLIMA's answer so as to ensure consistency of Commission's policy with relevant case law.

4. CONCLUSION

Therefore, in light of all the arguments described above, it is submitted that the exception laid out in the first indent of Article 4(3) cannot be legally applied to reject my request for access to documents. Accordingly, I respectfully ask the Secretariat General to reconsider DG

[14] http://ec.europa.eu/governance/impact/index_en.htm
[15] Case T-439/08 Kalliope v. Commission, para. 107 - 108.
[16] Case C-353/99 P, Council v. Hautala, para. 28.

CLIMA's rejection of our request for access to certain documents which the latter declined to give.

Alternatively, regardless of the Commission's decision for full access to all documents which I have requested in this letter, I consider that the above arguments present sufficient grounds for the Commission to reconsider granting partial access to the same documents described.

Finally, whatever decision the Commission takes regarding our request for reconsideration of the access to documents described in this letter, I reserve the right to seek all potential legal actions under European Union law to obtain access to the documents described.

Philippe Dusser

Annexes:

Annex 1. My application for access to documents dated 19th March 2014
Annex 2. DG CLIMA's reply received on April 10th 2014.