



EUROPEAN COMMISSION

Brussels, 21.5.2023
C(2023) 3437 final

Ms Vicky Cann
Corporate Europe Observatory
Rue d'Edimbourg 26
1050 Brussels

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001 ¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 – 2022/5754**

Dear Ms Cann,

I am writing in reference to your confirmatory application registered on 7 December 2022, submitted in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents ² (hereafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for the delay in replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 10 October 2022, handled by the Directorate-General for Internal market, Industry, Entrepreneurship and SMEs, you requested access to:

‘[...] documents related to the Chemical Strategy for Sustainability, and in particular to the reform of the CLP and REACH Regulations:

1. A list of all meetings/ discussions that have taken place since 1st December 2021 between Commissioner Breton and representatives of his cabinet (in particular Gaelle Garnier, Joan Canton and Valere Moutarlier), the directors and the director-general of DG GROW, with representatives of individual companies (including their lobby consultancies and law firms) and/or industry associations on the other hand, specifically:

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

BDI, VCI, CEFIC, Eurometaux, Bayer, BASF, PlasticsEurope, Corteva, 3M, Chemours, Corbion, Solvay.

2. Any records, minutes or notes of these meetings/discussions.

3. Any briefings prepared for these meetings.

4. All correspondence exchanged since 1st December 2021 (including SMS & any other type of messages processed through phone apps - eg., WhatsApp, Signal, Telegram etc, recorded voice messages, emails, letters and attached documents) between the above DG GROW officials and representatives of individual companies (including lobby consultancies and law firms) and/or industry associations on the other hand.’.

The Directorate-General for Internal market, Industry, Entrepreneurship and SMEs has identified the following documents as falling under the scope of your request:

- Minutes of meeting with BDI of 14 December 2021, reference Ares(2023)1102934 (hereafter ‘document 1’);
- Fiche d’entretien with CEFIC of 25 May 2022, reference Ares(2023)636197 (hereafter ‘document 2’);
- Email on meeting with Eurometaux of 5 September 2022, reference Ares(2022)6124860 (hereafter ‘document 3’);
- Email with Eurometaux of 29 September 2022, reference Ares(2022)6716646 (hereafter ‘document 4’), which includes the following annexes:
 - Position paper REACH revision (hereafter ‘document 5’);
- Briefing for meeting with VCI of 29 June 2022, reference Ares(2023)636520 (hereafter ‘document 6’);
- Fiche d’entretien with Chemours of 22 March 2022, reference Ares(2023)636667 (hereafter ‘document 7’);
- Minutes of meeting with Bayer of 26 July 2022, reference Ares(2022)5405458 (hereafter ‘document 8’).

In its initial reply of 22 November 2022, the Directorate-General for Internal market, Industry, Entrepreneurship and SMEs granted full access to document 5 and wide partial access to documents 1-4 and 6-8, subject to redactions based on the exception of Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation (EC) No 1049/2001. Some parts were also redacted as out of scope.

In your confirmatory application, you request a review of this position. You ask for a review of the full identification of documents and a confirmation that the redactions marked as not in the scope of your request are indeed irrelevant to its scope.

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 by the Directorate-General concerned at the initial stage.

Following this review, the following documents have been identified at confirmatory stage as falling within the scope of your request:

- Annex to document 3 (hereafter ‘document 9’).

I can inform you that:

- full access is granted to document 9, except for parts which are out of the scope of the request;
- Further partial access is granted to document 6 to parts which were initially redacted as out of scope, except for a redaction based on the exception of Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation (EC) No 1049/2001 and except the parts which are out of the scope of the request.

As regards documents 1-5, 7 and 8, I regret to inform you that I have to confirm the initial decision of Directorate-General for Internal market, Industry, Entrepreneurship and SMEs to refuse access, based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation (EC) No 1049/2001, for the reasons set out below.

I would also like to confirm that the Commission does not hold any other documents, including a list of all meetings, correspondence in the form of SMS, messages transmitted through phone apps or voice recordings. As regards the meetings attended by Commissioner Breton or members of his cabinet, or the Director-General of Directorate-General for Internal market, Industry, Entrepreneurship and SMEs, you can find these in the public calendars available on Europa website ³.

Moreover, I would like to confirm that the Commission does not hold a list of meetings with lobby representatives at the level of Director.

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.

I 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 [(EC) No] 1049/2001 nor the obligation of assistance in Article 6(2) thereof,

³ See <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=3a3b8835-fc03-4720-91d5-caa8c0e81d81>, <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=927e0831-3a4b-48f3-82d0-7524f4b31b9b>, and <https://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=66b9a93e-bac3-4820-8f21-9576b54e3428>.

can oblige an institution to create a document for which it has been asked to grant access but which does not exist’⁴.

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 [(EC)] 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 [(EC)] No 1049/2001’⁵.

In the present case, while the Commissioners, their Cabinets, and the Directors-General keep records of meetings with organisations and self-employed individuals, they do not hold any list of all meetings of its staff with the specific organisations and self-employed individuals concerned by your request. In this respect, I would like to confirm that compiling such a list in order to fulfil your request would equal to creation of a new document in the meaning of the corresponding paragraphs of the judgments in Cases C-127/13 P and C-491/15 P as neither can such a list be extracted from a database by means of a normal or routine search⁶.

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 exist⁷. This presumption continues to apply unless the applicant can rebut it by relevant and consistent evidence. The Court of Justice, ruling on an appeal in Case C-440/18 P, has confirmed these conclusions⁸.

As regards your request of review of the parts redacted as ‘out of scope’, please note that the redacted parts of document 1-9 are indeed considered outside the scope of your request as they do not relate to the revision of the CLP or that of the REACH Regulation.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’.

⁴ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

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

⁶ *Typke v European Commission* judgment, cited above, paragraph 47; Judgment of the General Court of 22 October 2011, *Dufour v ECB*, T-436/09, EU:T:2011:634, paragraphs 103 and 153.

⁷ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

⁸ 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.

In its judgment in Case C-28/08 P (*Bavarian Lager*)⁹, the Court of Justice ruled that when a request is made for access to documents containing personal data, 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 data¹⁰ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC¹¹ (hereafter ‘Regulation (EU) 2018/1725’).

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’¹².

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’¹³.

Document 1-4 and 6-9 contain personal data such as the names and initials of persons who do not form part of the senior management of the European Commission. Moreover, it contains personal data of third parties, staff of companies, which are not public figures acting in a public capacity.

The names¹⁴ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

⁹ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

¹⁰ OJ L 8, 12.1.2001, p. 1.

¹¹ OJ L 295, 21.11.2018, p. 39.

¹² *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

¹³ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁴ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data ¹⁵. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. In fact, you expressly mention ‘[p]lease note that I do not expect or wish to receive personal data’. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects’ legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

¹⁵ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note also that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

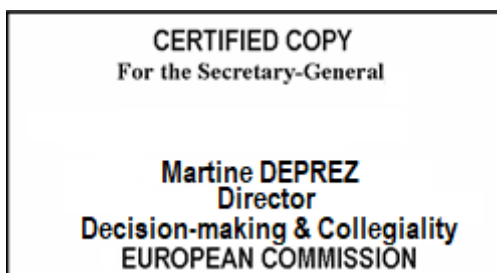
As explained above, full access is granted to document 9 and further partial access is granted to document 6, except for parts that are not in the scope of the request.

These documents were drawn up for internal use under the responsibility of the relevant officials of the Directorate-General for Internal market, Industry, Entrepreneurship and SMEs. They solely reflect the author's interpretation of the interventions made and do not set out any official position of the third parties to whom the document refers and who were not necessarily consulted on their content. It does not reflect the position of the Commission and cannot be quoted as such.

5. 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*

Enclosures: (2)