



EUROPEAN COMMISSION

Brussels, 17.7.2023
C(2023) 4937 final

Mr Carlo Martuscelli

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents – GESTDEM
2023/1586**

Dear Mr Martuscelli,

I am writing in reference to your email of 12 April 2023, 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’). Please accept our apologies for the delay in replying to your request.

In your initial application of 13 March 2023, you requested access to, I quote:

‘The text messages exchanged between Commission President Ursula von der Leyen and the CEO of Pfizer Albert Bourla in the months leading up to the signing of the third COVID-19 vaccine contract with Pfizer/BioNTech, [...].

[You are] also requesting all available meta-data relating to the text messages, including but not limited to, the devices and applications used to exchange messages, the number of messages sent by each side, the times and dates of the messages, and any locational data associated with the messages.’

By letter of 29 March 2023, unit E.4 ‘Health, Education & Culture’ of the Secretariat-General of the European Commission informed you that the European Commission does not hold any documents that would correspond to the description provided in your application.

In your confirmatory application, you request a review of this position.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L145, 31.05.2001, p. 43.

In your application, you claim that, I quote, '[...] [t]he existence of these documents — text messages exchanged between Commission President Ursula von der Leyen and Pfizer Chief Executive Albert Bourla - are attested to in an article by the New York Times published on April 28, 2021, titled "How Europe Sealed a Pfizer Vaccine Deal With Texts and Calls.'

You also point out that:

'if an exchange of texts did occur, it happened at a formal stage of the procurement process that on other occasions saw the Joint Negotiating Team's involvement. Therefore, it is not credible that they did not contain important information, especially given the high-level of both counterparties involved in the exchange.'

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 service or Directorate-General concerned at the initial stage. Against this background and following the renewed, thorough search for the documents requested, I confirm the initial position of unit E.4 'Health, Education & Culture' of the Secretariat-General, namely, that the European Commission does not hold any documents that would correspond to the description given in your application.

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 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist'³.

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 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 No 1049/2001'⁴.

Moreover, please note that according to Article 3(a) of Regulation (EC) No 1049/2001, a 'document' shall mean any content whatever its medium concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility. In accordance with Article 7(1) of Commission Decision of 6.7.2020 on records management and archives⁵, '[d]ocuments shall be registered if they contain important

³ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

⁴ Judgment of the Court of Justice of 11 January 2017, *Typke v European Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

⁵ Commission Decision (EU) 2021/2121 of 6 July 2020 on records management and archives,

information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments'. This means that text messages would have been registered if they contained important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments in accordance with the document registration rules. As stated above, no documents falling within the scope of your request could be identified.

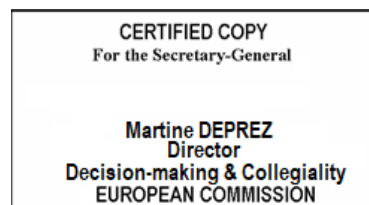
Given that the European Commission does not hold any such documents corresponding to the description given in your application, it is not in a position to fulfil your request.

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 exist⁶. This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence⁷. A mere suspicion that there must be more documents does not suffice to put in question the presumption of legality of the institution's statement⁸. The Court of Justice, ruling on an appeal in Case C-440/18 P, has confirmed these conclusions⁹.

In your confirmatory application, you claim that '[t]here is clear public interest here with both with [both MEPs](#)¹⁰ and [ministers from EU countries](#)¹¹ asking the Commission for more clarity on these points'. Indeed, as specified in Articles 4(2) and 4(3) of Regulation (EC) No 1049/2001, access to documents protected under these exceptions cannot be refused if there is an overriding public interest in disclosure. However, given that the European Commission does not hold any documents corresponding to the description given in your application, there is no need to assess the existence of an overriding public interest capable of prevailing over the interests protected in Articles 4(2) and 4(3) of Regulation (EC) No 1049/2001.

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

C/2020/4482 , OJ L 430, 2.12.2021, p. 30–41, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D2121>.

⁶ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

⁷ *Ibid.*

⁸ *Verein Deutsche Sprache v Commission* judgment, cited above, paragraph 37.

⁹ 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.

¹⁰ <https://www.politico.eu/article/mep-european-parliament-ursula-von-der-leyen-pfizer-vaccine-contract/>.

¹¹ <https://www.politico.eu/article/europe-coronavirus-vaccine-glut-call-contract-transparency/>.