



EUROPEAN COMMISSION
Secretariat-General

Directorate C – Transparency, Efficiency & Resources
The Director

Brussels
SG.C.1

Mr Carlo Martuscelli

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Subject: Your application for access to documents – EASE 2023/1587

Dear Mr Martuscelli,

I refer to your request of 13 March 2023, registered on the same day, in which you make a request for access to documents, under the above-mentioned reference number.

Please accept our apologies for the delay in the handling of your request.

1. SCOPE OF YOUR REQUEST

You request access to, I quote:

‘All documents related to decision by the European Commission not to grant journalist Alexander Fanta access to text messages and other documents relating to the exchange between President Ursula von der Leyen and Albert Bourla, the chief executive of Pfizer, since January 1, 2021, as set out in the following Freedom of Information request:

[https://urldefense.com/v3/_https://www.asktheeu.org/en/request/exchange_between_president_von_d*incoming-31706_!w!!DOxrgLBm!AQhTbLGW5-
yo2cSbcBTbYVAOPoUhKPxDpJhRPqa9LMt8EzYvrCplEAtywKjmR6cfTda8QFP-
1FATpE8fehV_Qf7yP5aXEWAw63h\\$](https://urldefense.com/v3/_https://www.asktheeu.org/en/request/exchange_between_president_von_d*incoming-31706_!w!!DOxrgLBm!AQhTbLGW5-
yo2cSbcBTbYVAOPoUhKPxDpJhRPqa9LMt8EzYvrCplEAtywKjmR6cfTda8QFP-
1FATpE8fehV_Qf7yP5aXEWAw63h$)’

In particular [you are] looking for:

-emails, meetings, reports, transcripts etc, that would provide a record of how that decision was taken Assessment and Conclusions under Regulation (EC) No 1049/2001’.

In addition, you are requesting ‘any internal Commission documents responding the European Ombudsman's decision to classify the Commission's refusal to provide the text messages as maladministration (see here: <https://www.ombudsman.europa.eu/en/press-release/en/158303>). This can include, but isn't limited to, documents, emails and memos,

produced by the Directorate General for Legal Services or for Transparency evaluating the decision.’

The Secretariat-General of the European Commission has identified the following documents, in relation to the Commission’s decision with reference C(2021)5592 final and internal reference GESTDEM 2021/2908 adopted on 22 July 2021, as falling under the scope of your request:

- 1. Confirmatory application of 28 May 2021, reference Ares(2021)3537787;
- 2. Request for contribution sent to unit E4 of the Secretariat-General of 28 May 2021, reference Ares(2021)3538764;
- 3. Contribution from unit E4 of the Secretariat-General of 28 May 2021, Ares(2021)3542277;
 - o 3.1. Annex, Email correspondence between unit E4 of the Secretariat-General and the President’s cabinet, 4-20 May 2021;
 - o 3.2. Annex, Identified document – Letter from Pfizer’s CEO to the President of the European Commission of 27 April 2021
 - o 3.3. Annex, Identified document – Email from Pfizer to the President of the European Commission of 28 April 2021
 - o 3.4. Annex, Identified document – Read-out of the videoconference between President von der Leyer and CEOs of pharmaceutical companies of 31 January 2021;
- 4. 1st letter of extension of the deadline, reference Ares(2021)3991833;
- 5. Reply from the President’s Cabinet of 23 June 2021, reference Ares(2021)4123628;
- 6. Approval of draft reply from unit E4 of the Secretariat-General, 25 June 2021, reference Ares(2023)2889232;
- 7. Consultation of the Legal service on draft confirmatory decision of 28 June 2021, reference Ares(2021)4193619;
 - o 7.1. Annex, draft confirmatory decision of 28 June 2021;
- 8. Approval of the draft confirmatory decision from the Legal service of 7 July 2021, reference Ares(2021)4412983
 - o 8.1 Annex, draft confirmatory decision of 7 July 2021;
- 9. 2nd holding letter of 9 July 2021, reference Ares(2021)4466082;
- 10. Commission reply to the European Ombudsman of 27 June 2022, reference C(2022) 4589 final.

I can inform you that:

- full access is granted to the documents ‘3.4. Annex, Identified document – Read-out of the videoconference between President von der Leyer and CEOs of pharmaceutical companies of 31 January 2021’ and ‘10. Commission reply to the European Ombudsman of 27 June 2022, reference C(2022) 4589 final’.
- Wide partial access is granted to documents ‘3.2. Annex, Identified document – Letter from Pfizer’s CEO to the President of the European Commission of 27 April 2021’ and ‘3.3. Annex, Identified document – Email from Pfizer to the

President of the European Commission of 28 April 2021' subject to redactions due to the protection of personal data as per point (b) of Article 4(1) of Regulation (EC) No 1049/2001.

- Access to the remaining documents has to be refused based on the exception provided for in Article 4(2) second indent (protection of the Court proceedings and legal advice) of Regulation (EC) No 1049/2001.

1.1. Protection of the 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'.

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹, 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 data² (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/EC³ (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'⁴.

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

¹ 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.

² OJ L 8, 12.1.2001, p. 1.

³ OJ L 295, 21.11.2018, p. 39.

⁴ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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’⁵.

The requested documents contain personal data such as the name and surname of staff members of the European Commission not forming part of the senior management and of third parties who are not public figures. Please note that documents disclosed following a request for access to documents submitted under Regulation (EC) No 1049/2001 become available to the public at large and not only to the applicant who has requested them.

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 data⁶. 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 request for access to documents, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. 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 subject concerned would be prejudiced by the disclosure of the personal data

⁵ 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.

⁶ 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.

reflected in the requested document, 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, 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.

1.1. Protection of court proceedings and legal advice

The second indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] court proceedings and legal advice [...] unless there is an overriding public interest in disclosure’.

In its *Turco* judgment in Case T-84/03⁷, the Court of First Instance underlined that the exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 protects two distinct interests: court proceedings and legal advice. In the case at hand, the refusal of the requested documents is based on the need to protect pending court proceedings.

In the *Philip Morris* judgment in Case T-796/14, the General Court confirmed that the scope of that exception is not limited to the protection of documents drawn up solely for the purposes of specific judicial proceedings, such as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise the equality of arms, which is a corollary of the very concept of a fair trial. The Court held indeed that ‘[...] in order for the exception to apply, it is necessary that the requested documents [...] should have a relevant link with a dispute pending before the Courts of the European Union [...] and that disclosure of those documents, even though they were not drawn up in the context of pending court proceedings, should compromise the principle of equality of arms [...]. In other words, it is necessary that those documents should reveal the position of the institution concerned on contentious issues raised during the court proceedings relied upon’⁸.

Recently, in Case T-485/18⁹, the General Court confirmed again that ‘[t]he second indent of Article 4(2) of Regulation No 1049/2001 also precludes the disclosure of documents that were not drawn up solely for the purposes of specific court proceedings, but whose disclosure is liable, in the context of specific proceedings, to compromise the principle of

⁷ Judgment of the Court of First Instance of 23 November 2004, *Maurizio Turco v Council*, T-84/03, EU:T:2004:339.

⁸ Judgment of the General Court of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 88.

⁹ Judgment of the General Court of 6 February 2020, T-485/18, *Compañía de Tranvías de la Coruña, SA v European Commission*, T-485/18, paragraph 42.

equality of arms'. The principles of equality of arms and sound administration of justice are at the heart of the exception of protection of court proceedings¹⁰.

In another *Philip Morris* judgment in Case T-18/15, the General Court ruled that 'the principle of equality requires the institution by which the contested act was issued to be in a position effectively to defend the legality of its actions before the courts. That possibility would be seriously compromised if the institution in question were obliged to defend itself, not only having regard to the pleas in law and arguments raised by the applicant (...), but also having regard to the positions taken internally concerning the legality of the various options envisaged in the context of the drawing up of the act in question (...)'¹¹.

Please note that there are ongoing proceedings before the General Court in Case T-36/23¹² at the time of the adoption of the present decision. These proceedings aim at challenging the Commission's confirmatory decision with reference C(2022)8371 final and internal reference GESTDEM 2022/2678 of 15 November 2022. In the latter decision, the applicants requested access to the same instant messages as in the framework of the decision C(2021)5592 final (internal reference GESTDEM 2021/2908) in relation to which you have submitted your initial application.

The identified documents have a link with these ongoing Court proceedings. The internal and preparatory documents pertaining to decision C(2021)5592 final are relevant for the ongoing Court proceedings because they would reveal internal elements setting the position of the institution, which is defended in these proceedings.

The public disclosure of these documents would reveal internal and preliminary positions of the services of the Commission involved in this matter and relevant for the ongoing Court case, while no other similar obligation would be imposed on the other parties. Taking into account that the subject matter of the ongoing court proceedings concerns the legality of the Commission's decision C(2022)8371 final, the content of which is similar to confirmatory decision C(2021)5592 final as far as the assessment regarding the instant messages in question is concerned, any disclosure of internal and preparatory documents related to this decision would clearly undermine the position of the Commission in the ongoing Court proceedings.

Lastly, for the purposes of this case at stake, it is useful to make a reference to Case T-851/16, *Access Info Europe*, where the General Court confirmed that 'although those documents have not been drawn up in the context of specific court proceedings, the integrity of the court proceedings concerned and the equality of arms between the parties

¹⁰ Judgment of the Court of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 85.

¹¹ Judgment of the General Court of 15 September 2016, *Philip Morris Ltd v Commission*, T-18/15, EU:T:2016:487, paragraph 73.

¹² <https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=T-36%252F23&for=&jge=&dates=&language=en&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lgrc=en&lg=&page=1&cid=2368645>.

could have been seriously compromised if parties were to benefit from privileged access to internal information belonging to the other party and closely connected to the legal aspects of pending or potential but imminent proceedings'¹³. Consequently, the principle of equality of arms would be compromised as public disclosure of the requested documents is liable, in the context of specific pending proceedings, to compromise the atmosphere of serenity in which the exchange of arguments by the parties must take place and the equality of arms. This would happen since only one party to the proceedings, namely the Commission, would have its internal documents and views disclosed to the public.

Therefore, there is a real and non-hypothetical risk that the disclosure of the documents requested would adversely and seriously affect the protection of court proceedings in the meaning of the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

2. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The Secretariat-General has not been able to establish the existence of any overriding public interest. The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness, provides further support to this conclusion.

In consequence, the Secretariat-General considers that, there is no overriding public interest that would outweigh the need to safeguarding the interests protected by the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

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

3. PARTIAL ACCESS

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

However, for the reasons explained above, no wider partial access is possible without undermining the already mentioned interests.

4. MEANS OF REDRESS

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

¹³ Judgment of the General Court of 7 February 2018, *Access Info Europe v European Commission*, T851/16, EU:T:2018:69, paragraph 72.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Unit C.1. 'Transparency, Document Management and Access to Documents'
BERL 7/076
B-1049 Brussels,

or by email to: sg-acc-doc@ec.europa.eu.

Yours sincerely,

Tatjana Verrier
Director

Enclosures: 3