Brussels, 9.8.2023
C(2023) 5535 final

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

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 under Regulation (EC) No 1049/2001 – EASE 2023/0325

Dear Ms Cann,

I refer to your email of 1 March 2023, registered on 2 March 2023, by which you submitted 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.

1. **SCOPE OF YOUR REQUEST**

In your initial application of 17 January 2023, handled by the Regulatory Scrutiny Board, you requested access to, I quote:

- *any impact assessments on the Mercury Regulation submitted to the Regulatory Scrutiny Board (RSB)*

- *all RSB opinions on these impact assessments*

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- a list and minutes of any upstream meetings held between RSB members and staff in the Commission on this file’.

The European Commission has identified the following documents as falling under the scope of your request:

- Draft impact assessment submitted to RSB of 15 November 2022, registered under reference number Ares(2022)7871350;
- Regulatory Scrutiny Board’s opinion on the above-mentioned impact assessment of 16 December 2022, registered under reference number Ares(2022)8770545;
- Minutes of an upstream meeting of 11 January 2022, registered under reference number Ares(2022)7871350.

In its initial reply of 24 February 2023, the Regulatory Scrutiny Board refused access to these documents based on the exception of the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

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

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.

Further to this review, it has to be specified that the following documents have been identified as falling under the scope of your confirmatory application:

- Draft impact assessment submitted to RSB of 15 November 2022, registered under reference number Ares(2022)7871350 (hereafter ‘document 1’), with the following annexes:
  - Annex 1: Procedural Information (hereafter ‘document 1.1’);
  - Annex 2: Stakeholder Consultation (hereafter ‘document 1.2’);
  - Annex 3: Who is affected and how? (hereafter ‘document 1.3’);
  - Annex 4: Analytical methods (hereafter ‘document 1.4’);
  - Annex 5: Detailed Baseline (hereafter ‘document 1.5’);
  - Annex 6: Problems and Drivers (hereafter ‘document 1.6’);
  - Annex 7: Impacts of shortlisted measures (hereafter ‘document 1.7’);
  - Annex 8: EU and International law on Mercury in respect of dental amalgam and mercury-added products (hereafter ‘document 1.8’);
- Regulatory Scrutiny Board’s opinion on the above-mentioned impact assessment of 16 December 2022, registered under reference number Ares(2022)8770545 (hereafter ‘document 2’);
- Minutes of an upstream meeting of 11 January 2022, registered under reference number Ares(2022)7871350 (hereafter ‘document 3’).
Following this review, I am pleased to inform you that:

- Full access is given to documents 1, 1.1-1.8 and 2;
- Wide partial access is given to document 3 with the exception of some parts which are redacted based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001 for the reasons set out below.

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’.

In its judgment in Case C-28/08 P (Bavarian Lager)\(^3\), 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 data\(^4\) (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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’\(^5\). Likewise, in the Psara judgment, the General Court added that Article 4(1)(b) ‘establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public […]’\(^6\).

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/EC\(^7\) (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.

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\(^5\) European Commission v The Bavarian Lager judgment, cited above, paragraph 59.


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’.

Document 3 contains personal data such as names and other details enabling the identification of staff members of the European Commission who do not form part of the senior management.

The names 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.

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 ‘the 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. 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.

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8 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.
9 European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
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 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, the Secretariat-General concludes 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.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note 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, partial access is given to document 3. No further partial access is possible without undermining the interests described above.

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: (11)