Decision of the European Commission pursuant to Article 4 of the Implementing Rules to Regulation (EC) No 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – EASE 2023/2336

Dear Ms Bounfour,

I refer to your email of 27 July 2023, registered on the same day, 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 documents (hereafter ‘Regulation (EC) No 1049/2001’).

1. Scope of Your Request

On 20 April 2023, you submitted an initial application for access to documents under Regulation (EC) No 1049/2001 to the European Commission, in which you requested ‘All documents—including but not limited to correspondence, emails, minutes, notes (hand written or electronic), audio or video recordings, verbatim reports, operational conclusions, lines to take, briefings, and presentations—related to the meeting on April 3rd 2017 between Antonio Lowndes Marques de Araujo Vicente and, Robert Schroder, members of cabinet of Carlos Moedas, and representatives Concawe.’

Given the subject matter of your application, its processing was attributed to the Directorate-General for Research & Innovation (DG RTD).

In its letter of 01 June 2023, DG RTD informed you that it did not identify any documents held by the Commission that would fall within the scope of your request.

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 of the European Commission conducts a review of the reply given by the service concerned at the initial stage.

Against this background, the Commission has carried out a renewed, thorough search for the document requested. Following this renewed search, the Secretariat-General confirms that the Commission has not identified any document that would correspond to the description given in your application.

In your confirmatory application, you state that “It is being argued that no written evidence is available on the meeting that took place on April 3rd 2017 between Antonio Lowndes Marques De Araujo Vicente (Cabinet member) and Robert Schröder (Cabinet member). This is highly unusual: that no email or any trace of meeting notes would be available for such an official meeting.”

Given that the Commission does not hold any further documents that fall within the scope of your initial application, it is not in a position to fulfil your request.

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. In this respect, your attention is drawn 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’.

The above-mentioned conclusion was 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.’

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Furthermore, 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 exist\(^5\). This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence\(^6\).

In your confirmatory application, you do not put forward any relevant or consistent evidence which could lead to the rebuttal of the presumption. To that end, please also note that a mere suspicion that there must be a document does not suffice to put in question the presumption of legality of the institution’s statement\(^7\). The Court of Justice, ruling on an appeal in Case C-440/18 P, has confirmed these conclusions\(^8\).

3. **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,

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\(^6\) *Ibid*.

\(^7\) *Ibid*, paragraph 37.