



EUROPEAN COMMISSION

Brussels, 22.2.2024  
C(2024) 1304 final

Suzy Sumner

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

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 – EASE 2023/3645**

Dear Ms Sumner,

I am writing in reference to your confirmatory application registered on 7 September 2023, submitted in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> (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 19 October 2022, handled by the Directorate-General for Health and Food Safety, you requested access to *'documents and minutes from meetings (in 2022) concerning the legislation package on Food Information to Consumers. This includes but is not limited to the conclusions of the assessment by the Regulatory Scrutiny Board in 2022'*.

The European Commission identified 29 documents falling under the scope of your request, as provided by the list of identified documents sent to you.

In its initial reply of 22 August 2023, the Directorate-General for Health and Food Safety ('DG SANTE') granted full access to documents 14 and 26-28, granted partial access to documents 1-13 and 15-25 and refused access to document 29 based on the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

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<sup>1</sup> OJ L 345, 29.12.2001, p. 94.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

In your confirmatory application, you request a review of the refusal to grant access to document 29. You underpin your request with detailed arguments, which will be addressed in the corresponding sections below.

## **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 the review of the document falling within the scope of your confirmatory application, I inform you that the Secretariat-General confirms the initial decision of DG SANTE to refuse access to document 29 based on the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

### **2.1. Protection of the decision-making process**

The first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 provides that ‘access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure’.

Document 29 is the opinion of the Regulatory Scrutiny Board (‘RSB’) on the draft impact assessment drawn up in the context of the revision of Regulation (EU) No 1169/2011 on the provision of food information to consumers in the areas of front-of-pack nutrition labelling, nutrient profiles, origin labelling, date marking and labelling of alcoholic beverages.

In your confirmatory application, you consider that ‘this negative decision [is] not correct given the Court of Justice of the European Union in Case C-57/16 P1 ruled that documents drawn up in the context of an impact assessment for a possible legislative proposal, including draft and final impact assessment reports and the opinions of the RSB, represent legislative documents which the Commission is obliged to make directly accessible to the public pursuant to Article 12(2) of Regulation No 1049/2001 and that access should not be denied on request.’

In this context, please note that the judgment in the case *ClientEarth* referred to above does not provide an unconditional right of direct access to any impact assessment documents but indicates that an individual assessment of the request for access still has to be made for each document drawn up in the context of an impact assessment.

The Court of Justice held that if the Commission is of the view that full access cannot be granted to a document drawn up in the context of an impact assessment, it will have to establish that disclosure would create a serious risk undermining its decision-making process.

Such a risk depends on factors such as the state of completion of the document in question, the precise stage of the decision-making process at stake at the time when access to that document is refused, the specific context in which that process takes place, and the issues still to be discussed internally by the institution concerned<sup>3</sup>.

In addition, in the recent judgement in case T-163/21, the General Court confirmed that EU primary law does not provide for an unconditional right of access to legislative documents, which is exercised instead in accordance with the general principles, limits and terms determined by means of regulations. Article 15(3) TFEU does not exclude legislative documents from its scope<sup>4</sup>.

In the present case, the Commission has not applied a general presumption of non-disclosure to the documents, but has performed an individual and concrete assessment, which resulted in granting full or partial access to 28 out of the 29 documents that fell within the scope of your initial request. That interpretation is consistent with Article 52(2) of the Charter of Fundamental Rights of the EU, according to which rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties<sup>5</sup>.

The principle of openness, although of fundamental importance to the EU legal order, is not absolute and, consequently, it remains open to the EU institutions to refuse, on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, to grant access to certain documents of a legislative nature in duly justified cases<sup>6</sup>.

As mentioned above, document 29 is the RSB opinion on the draft impact assessment drawn up in the context of the revision of Regulation (EU) No 1169/2011 to ensure better labelling information and help consumers make healthier and more sustainable food choices and tackle food waste. The revision requires thorough analysis for which Commission services need the necessary room for reflection and for internal discussion as they must be free to explore all possible options in preparation of a decision. The introduction of harmonised mandatory front-of-pack nutrition labelling, the setting of nutrient profiling criteria to restrict claims made on foods, the extension of mandatory origin or provenance information for certain products, the revision of the rules on date marking and the introduction of mandatory indications of the list of ingredients and the nutrition declaration for all alcoholic beverages have been the subject of political discussions for a long time, due to the sensitive nature of the issues involved and the existence of very stark differences of opinion between Member States.

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<sup>3</sup> Judgment of the Court of Justice of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 111.

<sup>4</sup> Judgment of the General Court of 25 January 2023, *De Capitani v Council*, T-163/21, EU:T:2023:15, paragraph 39 and 46.

<sup>5</sup> *Ibid*, paragraph 43.

<sup>6</sup> *Ibid*, paragraphs 56 and 57.

The Commission submitted the draft impact assessment to the RSB for its opinion on 2 September 2022. While the RSB delivered its opinion on 28 September 2022, the draft impact assessment is still being revised following the substantial recommendations formulated by the RSB in its opinion. Releasing the opinion of the RSB at this stage would reveal preliminary views and policy options, which are currently under consideration and for which no political decision has been taken, and which are thus subject to change. Disclosure of such preliminary views and policy options would prematurely pre-empt and thereby prejudice the decision-making process of the Commission on this file, which is particularly sensitive.

As the revision is meant to contribute to the ambitious objectives set under the Green Deal and its Farm to Fork Strategy, as well as Europe's Beating Cancer Plan, it is especially important to have robust underlying evidence for the assessment that will inform the political decision. The Commission services are still working on the draft impact assessment, for instance relating to the parts concerning the impact analysis of key policy options, including on cost and benefit estimates, impacts on health, consumer behaviour, competitiveness and SMEs, as well as the analysis and choice of the preferred package of options. As the Commission has not yet taken a decision on this, the decision-making process is not completed and is still ongoing. Concretely, at the present stage, fundamental elements of the draft impact assessment and annex are still under consideration.

It is not possible to give more detailed reasons justifying the need for confidentiality of this document without disclosing its content and, thus, depriving the exception of its very purpose<sup>7</sup>.

Consequently, the Secretariat-General considers that there is a reasonably foreseeable and not purely hypothetical risk that public disclosure of document 29 would bring a serious harm to the decision-making process concerned.

In light of the above, the Secretariat-General concludes that document 29 needs to be protected on the basis of the exception laid down in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 and that further access thereto must be refused.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

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<sup>7</sup> Please see in this respect: Judgment of the General Court of 8 February 2018, *Pagkyrios organismos ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 71.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests that motivated the refusal<sup>8</sup>.

In your confirmatory application, you do not mention any overriding public interest.

Nor has the Secretariat-General been able to identify any public interest capable of overriding the public and private interests protected by Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

#### **4. PARTIAL ACCESS**

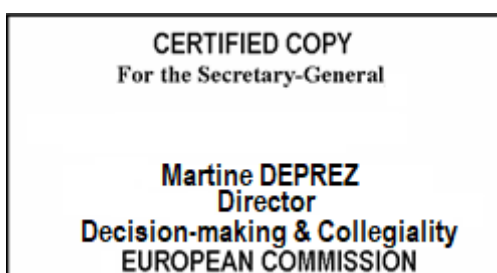
In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting partial access to the documents requested.

The Commission gave full or partial access to 28 out of the 29 documents requested at initial stage. However, no meaningful access to document 29 is possible without undermining the interest 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*

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<sup>8</sup> Judgment of the General Court of 9 October 2018, *Anikó Pint v Commission*, T-634/17, EU:T:2018:662, paragraph 48; judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v Commission*, T-727/15, EU:T:2017:18, paragraph 53; judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v Commission*, T-875/16, EU:T:2018:877, paragraph 84.