



EUROPEAN COMMISSION

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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 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2019/4312**

Dear Ms Cann,

I refer to your e-mail of 18 September 2019, registered on 19 September 2019, in which you submit 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<sup>2</sup> (hereafter 'Regulation (EC) No 1049/2001').

I apologise for the delay in the handling of your application.

**1. SCOPE OF YOUR REQUEST**

In your initial application of 22 July 2019, registered under reference GESTDEM 2019/4312 and addressed to the Directorate-General for Health and Food Safety, you requested access to, I quote: 'a list of lobby meetings held by the French Government was discussed. The list should include the names of the individuals and organisations attending; the date, and any agendas, minutes, notes produced. I would additionally like to receive any third party position papers, e-mails, or other correspondence which relates to discussions around the French Government's ban on E171. This should include all meetings of SCOPAFF.'

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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.

The European Commission has identified 27 documents as falling under the scope of your request<sup>3</sup>.

In its initial reply of 4 September 2019, the Directorate-General for Health and Food Safety:

- Granted full access to documents 25, 26 and 27;
- Granted partial access to documents 1 to 22 and 24, subject only to the redactions of personal data in accordance with Article 4(1)(b) of Regulation (EC) No 1049/2001;
- Refused access to document 23 based on the exceptions of Article 4(1)(a), third indent (protection of the public interest as regards international relations) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request, I quote: ‘to review the decision not to release document 23 which originated from the United States Mission to the EU. The decision on E171 is of great public interest as it involves a chemical used in many day-to-day food products. It is in the public interests to know the details of how all third parties are seeking to influence that decision-making.’

You do not contest the partial refusal of access to documents 1 to 22 and 24. Consequently, the partial refusal of access to documents 1 to 22 and 24 does not fall within the scope of this confirmatory review.

## **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 fresh review of the reply given by the Directorate-General concerned at the initial stage.

The document 23 is the letter from the United States Mission to the EU of 8 May 2019 addressed to Ms Anne Bucher, Director-General of the Directorate-General for Health and Food Safety, concerning French Decree suspending the placing on the market of foodstuffs containing E171 additive (reference Ares(2019)3167764).

Under the provision of Article 4(4) of Regulation (EC) No 1049/2001, the Secretariat-General of the European Commission re-consulted the authorities of the United States at the confirmatory stage. The authorities of the United States maintained their opposition to the disclosure of document 23, based on the exception invoked already at the initial stage, namely the exception protecting the public interest as regards international relations provided for in Article 4(1)(a), third indent of Regulation (EC) No 1049/2001.

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<sup>3</sup> The full list of these documents was enclosed to the reply of the Directorate-General for Health and Food Safety of 4 September 2019 (Ares(2019)5557496).

In their reply to the above-referred consultation, the authorities of the United States argued that a full disclosure of document 23 would effectively undermine the public interest as regards the protection of international relations. According to the authorities of the United States, granting public access to the document concerned which has been transmitted through its official diplomatic channels (the United States Mission to the European Union) carries out the concrete risk of undermining the interests of both the EU and the United States. Disclosure of this document would inhibit the free exchange of views between the United States and the EU institutions.

I have carried out a detailed examination of the document requested, taking into account the result of the third party consultations at initial and confirmatory levels, and I have come to the conclusion that their arguments justify the non-disclosure of the requested document on the basis of the exception provided for in Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

In addition, I have concluded that the requested document contains personal data that must be withheld based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

#### *2.2.1 Protection of the public interest as regards international relations*

Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations [...]'.<sup>4</sup>

As far as the protection of international relations is concerned, the General Court has acknowledged that 'the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'.<sup>4</sup>

Moreover, the General Court ruled that, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, 'it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be

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<sup>4</sup> Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council of the EU*, T-264/04, EU:T:2007:114, paragraph 40.

adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation'.<sup>5</sup>

The document requested in your confirmatory application presents considerations made by the United States government representatives to the EU staff concerning regulatory measures that could have as an effect, in the opinion of the United States authorities, an impact on international trade relations between the EU and the United States. The document reflects the position of the United States in respect of the French Order (ECOC1911549A) of 17 April 2019 suspending the placing on the market of foodstuffs containing the food additive titanium dioxide (E 171) as of 1 January 2020, which was notified to the European Commission on 26 April 2019. This document sets out the concerns of the United States about this measure, in particular about its risk assessment, food safety basis, and the potential disruptions it would have on the internal market as well as on trade for third countries.

Revealing the details of this communication would jeopardise the possibility of frank and sincere exchanges between the European Commission and the United States, by making the United States representatives naturally more guarded about sharing information and positions with EU staff in the future.

Furthermore, the requested document contains sensitive information, which is not public and which the European Commission received from the third country on a confidential basis. Disclosure of this information, against express statements of the providing party, would undermine the relation of trust with the parties thus negatively affecting the international relations of the EU.

I came to the conclusion that public access to the requested document would pose a risk to the public interest as regards the protection of the international relations. Given the importance of the subject matter, the potential involvement of third countries and media attention to the file, I consider this risk as reasonably foreseeable and not purely hypothetical.

In light of the above, I must conclude that the use of the exception under Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001 is justified, and that access to the document must be refused on that basis.

### *2.2.2 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'.

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<sup>5</sup> Judgment of the General Court of 11 July 2018, *ClientEarth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23. See also Judgment of the Court of Justice of 3 July 2014, *Council v In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

In its judgment in Case C-28/08 P (*Bavarian Lager*)<sup>6</sup>, 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<sup>7</sup> (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/EC<sup>8</sup> (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’.<sup>9</sup>

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’.<sup>10</sup>

The requested document contains personal data such as the name and surname, telephone numbers, position of the natural person who is an official of the United States national authorities. The names<sup>11</sup> of the person concerned as well as other data from which its identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725. In addition, it also contains biometric data, namely a handwritten signature.

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

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<sup>6</sup> 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.

<sup>7</sup> OJ L 8, 12.1.2001, p. 1.

<sup>8</sup> OJ L 205, 21.11.2018, p. 39.

<sup>9</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>10</sup> 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.

<sup>11</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

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.<sup>12</sup> 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. 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 reflected in the document, as there is a real and non-hypothetical risk that such public disclosure would harm its privacy and subject it to unsolicited external contacts.

Consequently, I conclude 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 be informed that the exceptions laid down in Article 4(1)(a) and (b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

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<sup>12</sup> 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.

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

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

However, no meaningful partial access is possible, as the whole content of the document in question is covered by the exceptions protecting international relations and personal data, provided for, respectively, in Article 4(1)(a), third indent and Article 4(1)(b) of Regulation (EC) No 1049/2001, for the reasons set out in the corresponding sections above.

Consequently, partial access is not possible considering that the document requested is covered in its entirety by the invoked exceptions to the right of public access.

#### **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  
Acting Secretary-General*