



EUROPEAN COMMISSION

Brussels, 20.4.2021
C(2021) 2898 final

Ms Vicky Cann
Corporate European Observatory
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Brussels 1050 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 - GESTDEM 2020/2238**

Dear Ms Cann,

I refer to your email of 20 July 2020, 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 documents² (hereafter 'Regulation (EC) No 1049/2001').

Please accept our sincere apologies for the delay in replying to your request.

1. SCOPE OF YOUR REQUEST

On 17 April 2020 you submitted an initial application for access to, I quote, '[...] a list of all lobby meetings (including phone calls, conference calls etc) held by DG Environment since 1 March 2020 where single-use plastics were discussed, including in the light of the developing coronavirus pandemic. The list should include the names of the individuals and organisations participating; the date; and any minutes / notes produced. I would additionally like to receive any emails or other correspondence related to single use plastics during this time period'.

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

By its reply of 7 July 2020, the Directorate-General for Environment identified in total 67 documents under reference number Ares(2020)2511371.

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, with regard to third party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

Upon consultation of the third parties concerned, the Directorate-General for Environment granted wide partial access, subject to the protection of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001 to 65 of those documents. I note that they were made available to you via a time limited webtransfer link.

I note that since then the documents have been made permanently available to you, to the email address provided in your application.

The Directorate-General for Environment fully refused access to four documents under the basis of the exception provided for in Article 4(2) first indent of Regulation (EC) No 1049/2001, namely:

- Email and attached note from Freshfel addressed to the Directorate-General for Environment of 17 April 2020 , reference Ares(2020)2511371;
- Email and attached note from Unilever addressed to the Directorate-General for Environment of 17 April 2020, reference Ares(2020)2511371.

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 fresh review of the reply given by the Directorate-General or service concerned at the initial stage.

The documents originate from third parties. In the context of the above-mentioned review, the European Commission consulted them again in line with the provisions of Article 4(4) of Regulation (EC) No 1049/2001. In particular the Secretariat-General consulted again Unilever and Freshfel on 15 October 2020 and another consultation letter was sent to Freshfel on 28 January 2021.

The third party author (Freshfel) maintained its opposition to the disclosure of the documents originating from it, based on the exceptions invoked already at the initial stage.

Having carried out a detailed examination of the documents requested, taking into account the result of the third party consultations at initial and confirmatory levels, I inform you that full access is granted to the note attached to the email of 17 April 2020 from Unilever and wide partial access is granted to the documents originating from Freshfel, subject to the redaction of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001. Please note that parts of the email correspondence containing the email from Freshfel include elements relating to organisational matters of the webinar (change of date due to the COVID-19 pandemic etc.), falling outside the scope of your request. The parts out of scope are marked as such in the document.

Please note, however, that the actual transmission of the documents originating from Freshfel is subject to the absence of a request by the third party originator for interim measures, as referred to in Section 3 of this decision.

As regards the email from Unilever, I regret to inform you that I have to confirm the initial decision of the Directorate-General for the Environment of the European Commission to refuse access to parts of this email falling within the scope of your request, based on the exceptions of Article 4(1)(b) (protection of personal data) and Article 4(2) first indent (protection of the commercial interest) of Regulation (EC) No 1049/2001, for the reasons set out below. I would also like to specifically underline that this email contains elements falling outside of scope of your request, as they do not relate at all to single-use plastics related issues.

In your confirmatory application, you explicitly mentioned that you are not interested in receiving personal data. Consequently, the personal data contained in the documents requested are considered as falling outside the scope of your request.

2.1. Protection of commercial interests of a natural or legal person

Article 4(2), first 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 commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'.

The documents in question originate from third parties. In accordance with Article 4(4) of Regulation (EC) No 1049/2001, the European Commission consulted them on disclosure of the documents.

Firstly, I note that Article 4(2), first indent of Regulation (EC) No 1049/2001 must be interpreted consistently with Article 339 of the Treaty on the Functioning of the European Union (TFEU), which requires staff members of the EU institutions to refrain from disclosing 'information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'. Applying Regulation (EC) No 1049/2001 cannot have the effect of rendering Article 339 of the Treaty on the Functioning of the European Union, over which it does not have precedence, ineffective.

The General Court has specifically confirmed on several occasions, that giving access to information particular to an undertaking which reveals its expertise, commercial strategies or business relations, is capable of undermining the commercial interests of this undertaking³.

Furthermore, as mentioned by the Court of First Instance (now General Court) in its judgment in Case T-198/03, ‘in order that information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible’⁴.

The email from Unilever containing the note on plant-based wipes, now disclosed to you, was provided to the European Commission following the webinar of 3 April 2020.

Parts of this email contain commercially sensitive information related to the packaging and innovation strategy of one of Unilever’s brands, which is known to a limited number of people. Such information contains commercial value for the brand in question.

Full disclosure of the document, would undermine the commercial interests of the economic operator concerned, as it would negatively affect its commercial activity, in particular in the competitive context in which it operates, as it would provide internal information on the packaging relating to one of its brands which is specifically mentioned in the email. Public disclosure of such information would be particularly likely to disrupt and adversely affect the business operations and the commercial interests of the company, as it would undermine its position in a highly competitive market.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operator concerned.

I conclude, therefore, that access to the parts of the document falling within the scope of your request must be denied based on the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

³ See Judgment of the General Court of 11 July 2018, *Rogesa v Commission*, T-643/13, EU:T:2018:423, paragraph 70 and Judgment of the General Court of 9 September 2014, *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraphs 83-84.

⁴ Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt v Commission*, Case T-198/03, EU:T:2006:136, paragraph 71

3. DISCLOSURE AGAINST THE EXPLICIT OPINION OF THE AUTHOR

According to Article 5(5) and (6) of the detailed rules of application of Regulation (EC) No 1049/2001, '[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.'

Both at initial and at confirmatory level, the third party originator (Freshfel) objected to disclose the documents originating from it on the grounds that it would undermine its commercial interests protected under Article 4(2) first indent, the international relations protected under Article 4(1)(a) third indent and the privacy and integrity protected under Article 4(1)(b) of Regulation (EC) No 1049/2001.

Since the decision to grant partial access is taken against the objection of the third party author expressed at initial and confirmatory levels, the Commission will inform the third party originator of its decision to give partial access to the documents requested. The Commission will not grant such partial disclosure until a period of ten working days has elapsed from the formal notification of this decision to the third party author, in accordance with the provisions mentioned above.

This time period will allow the third party author to inform the Commission whether it intends to object to the partial disclosure using the remedies available to it, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the third party author has not signalled its intention to avail itself of the remedies at its disposal, the Commission will forward the redacted documents to you.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2) 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.

In your confirmatory application you argue that, I quote, '[t]here is indeed an overriding public interest rationale for the Commission to be fully open with the public about the lobbying that it receives. Article 15 of the Treaty on the Functioning of the European Union states: In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible. EU institutions are under an obligation to take decisions as openly and closely as possible to the citizens.'

There should be no place for lobbying of the Commission that is kept entirely secret, especially when it is by those with commercial interests in EU policy-making. I note that in your response, you say that “the companies concerned have expressly refused access to this information provided to the Commission”. However, while private companies are free to point out what they consider to be confidential data, they are not in a position to veto disclosure of documents. This is not the first time that I have challenged the non-disclosure of lobby documents at the Commission; in the recent case of 2020/490 I was provided with the missing documents after a confirmatory application similar to this one. I ask that the Commission re-consider the decision to refuse access to the documents⁵.

Please note that such general considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question⁵.

The Court of Justice, in the *Strack* case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance⁶.

Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure⁷.

I would like to underline that in accordance with Article 4(4) of Regulation (EC) No 1049/2001, the European Commission shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed. However the final assessment and decision regarding disclosure of the document[s] remains with the institution, as the present confirmatory decision demonstrates.

I note that the European Commission has made significant efforts to increase the transparency of its decision-making process, including with regard to its relations with lobbyists, notably by introducing the obligation to publish meetings between the senior management of the institution and organisations and self-employed individuals. Furthermore, in relation to your topic of interest (the single-use plastics), the European Commission has conducted several stakeholder meetings, which were open to the public, among others a stakeholder event on the SUP Guidelines on 3 April 2020 with more than 160 participants.

⁵ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

⁶ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 128 (hereafter *Strack v Commission*).

⁷ *Strack v Commission*, cited above, paragraph 129.

Therefore, while I agree that there is public interest in the subject matter in question, I consider that the need for full transparency does not outweigh in this case the need to protect the withheld information in the email originating from Unilever, pursuant to the exception relating the protection of commercial interests.

5. PARTIAL ACCESS

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

Full access is granted to the note submitted by Unilever and partial access to the documents originating from Freshfel subject to the redaction of personal data and of parts falling outside the scope, withheld in full at the initial stage. However, for the reasons explained above, no further partial access is possible to the email of Unilever without undermining the interests described above.

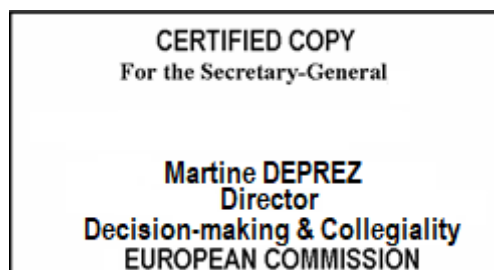
Please note that the documents originate from a third parties and are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originator. The European Commission does not assume any responsibility from the reuse.

6. 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



Enclosure : [3]