



EUROPEAN COMMISSION

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████████████████████  
SNE (Specialised Nutrition Europe)  
Avenue des Nerviens 9-31  
1040 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 2018/5850**

Dear ██████████,

I refer to your email of 8 January 2019, registered on 9 January 2019, in 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<sup>2</sup> (hereafter ‘Regulation (EC) No 1049/2001’).

In your initial application of 8 November 2018 addressed to the Legal Service of the European Commission, you submitted a request for access to ‘any document related to current discussion on a draft Commission Regulation proposing to prohibit the use of health claims made on mandatory nutrient for infants and young children foods (SANTE/10891/2015)’. You specified that ‘[t]hese documents could encompass, inter alia, any document/exchange with DG SANTE to assess the legal feasibility/options of such a prohibition within the EU legislative framework’.

By letter of 17 December 2018, the Legal Service of the European Commission informed you that it does not hold any documents falling within the scope of your request.

In your confirmatory application, you questioned the absence of any documents. You also specified that your request relates to any documentation:

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.  
<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

- 'Dated of 2016, 2017 or 2018;
- Assessing the different options put forward by DG SANTE with regard to the authorisation of the use of health claims for foods for infants and young children for which applications were submitted, inter alia by SNE, in accordance with Article 14 of Regulation (EC) No 1924/2006; and/ or
- Providing information on the legal feasibility of the proposal of DG SANTE to prohibit the use of health claims made on mandatory nutrients for foods for infants and young children'.

Against this background, the European Commission has carried out a renewed, thorough search for the documents requested.

Following this renewed search, I confirm that the European Commission does not hold any documents that would correspond to the description given in your application.

Indeed, 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. I would like to refer in this respect to the judgment of the Court of Justice in Case C-127/13 P (*Strack v 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'.<sup>3</sup>

The above-mentioned conclusion has been confirmed in Case C-491/15 P (*Typke v 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 No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist. It follows that, [...], an application for access that would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation No 1049/2001'.<sup>4</sup>

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.<sup>5</sup> This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence.<sup>6</sup> The Court of Justice, ruling on an appeal in Case C-440/18 P, has recently confirmed these conclusions.<sup>7</sup>

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<sup>3</sup> Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, Case C-127/13 P, EU:C:2014:2250, paragraph 46.

<sup>4</sup> Judgment of the Court of Justice of 11 January 2017, *Typke v Commission*, Case C-491/15 P, EU:C:2017:5, paragraph 31.

<sup>5</sup> Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v Commission*, Case T-468/16, EU:T:2018:207, paragraphs 35-36.

<sup>6</sup> *Ibid.*

<sup>7</sup> Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, not yet published, Case C-440/18 P, paragraph 14.

Therefore, given that the European Commission does not hold any documents corresponding to the description given in your application, it is not in a position to fulfil your request.

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*  
*Martin SELMAYR*  
*Secretary-General*