



EUROPEAN COMMISSION

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**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 – GESTDEM
2021/2908**

Dear Mr Fanta,

I am writing in reference to your email of 28 May 2021, registered on the same day, by which you lodge 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’).

In your initial application of 4 May 2021, you requested access to, I quote

- Text messages and other documents relating to the exchange between President Ursula von der Leyen and Albert Bourla, the chief executive of Pfizer, since January 1, 2021. The exchange was reported in the New York Times on April 28 in the story "How Europe Sealed a Pfizer Vaccine Deal With Texts and Calls". See here: [https://urldefense.com/v3/_https://www.nytimes.com/2021/04/28/world/europe/european-union-pfizer-von-der-leyen-coronavirus-vaccine.html_!!DOxrgLBm!X6q_vfg2EvLrDSEbEDNrbQ7tFq-FTzBgdtfzYNnm2y49WHIYa2McBzAJYd4Te59A_7XxUw\\$](https://urldefense.com/v3/_https://www.nytimes.com/2021/04/28/world/europe/european-union-pfizer-von-der-leyen-coronavirus-vaccine.html_!!DOxrgLBm!X6q_vfg2EvLrDSEbEDNrbQ7tFq-FTzBgdtfzYNnm2y49WHIYa2McBzAJYd4Te59A_7XxUw$)

- An internal European Commission assessment of the EU’s vaccine needs over the next two years, as referenced in the same story.’

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L145, 31.05.2001, p. 43.

By letter of 26 May 2021, unit E.4 ‘Health, Education & Culture’ of the Secretariat-General of the European Commission identified three documents as falling within the scope of your request, namely:

- Email from Pfizer to the President of the European Commission of 28 March 2021, reference Ares(2021)3474551, hereafter document 1;
 - o Letter from Pfizer to the President of the European Commission of 27 March 2021 (attachment to the email), hereafter document 1.1;
- Press release, Read-out of the videoconference between President von der Leyen and CEOs of pharmaceutical companies of 31 January 2021, reference Ares(2021)3474551, hereafter document 2.

Unit E.4 ‘Health, Education & Culture’ of the Secretariat-General granted full access to document 2 and wide partial access, subject only to the redaction of personal data to document 1 and document 1.1.

In your confirmatory application, you question the absence of more documents, in particular text messages, falling within the scope of your request. Furthermore, you contest the fact that the initial reply lacked customary features, such as ‘Assessment and Conclusion under Regulation (EC) No 1049/2001’, as well as a ‘Means to Redress’. In this respect, please accept our apologies for the absence of certain customary features of the Commission’s initial replies to access to documents requests.

1. 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 service or Directorate-General concerned at the initial stage.

Following this review, I would like to confirm the initial position of Unit E.4 ‘Health, Education & Culture’ of the Secretariat-General to refuse access to the personal data contained in the documents.

Furthermore, the European Commission has carried out a renewed, thorough search for the documents requested. Following this renewed search, I confirm that the Commission does not hold any more documents that would correspond to the description given in your application at the date you submitted your confirmatory request.

1.1. 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’.

In its judgment in Case C-28/08 P (*Bavarian Lager*)³, 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 data⁴ (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/EC⁵ (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’⁶.

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’⁷.

The requested documents contain the names and surnames of staff members of the European Commission not holding any senior management positions, as well as names, surnames, email addresses, and a handwritten signature of Pfizer’s representatives.

Please note that, whereas the endings of email addresses (for instance ‘[...]@pfizer.com’) were not disclosed at the initial stage, they are disclosed for the purposes of this decision, as they do not constitute personal data.

The names⁸ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

³ 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.

⁴ OJ L 8, 12.1.2001, p. 1.

⁵ OJ L 295, 21.11.2018, p. 39.

⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁷ 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.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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 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) No 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 of its own motion the existence of a need for transferring personal data⁹. This is also clear from Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, the European Commission has to examine the further conditions for a 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 weighted the various competing interests.

In your confirmatory application you have not established the necessity of disclosing any of the above-mentioned personal data.

Consequently, I consider that the necessity for the transfer of personal data (through its public disclosure) included in the documents concerned has not been established. 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 subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them 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

⁸ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

⁹ 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.

to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

In this light, I consider that its public disclosure under Regulation (EC) No 1049/2001, is prevented by the above-mentioned exception in Article 4(1)(b) of that regulation.

1.2. No further documents held

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 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’¹⁰.

The above-mentioned conclusion has been 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 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 1049/2001’¹¹.

Against this background, the European Commission has carried out a thorough search for the documents requested. Following this search, I confirm that the European Commission does not hold any documents that would correspond to the description given in your application.

Regarding your request to have access to text messages, I confirm that that according to Article 3(a) of Regulation 1049/2001, a ‘document’ shall mean any content whatever its medium concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.

However, the institution is not obliged to preserve each and every document.

In accordance with Article 7(1) of Commission Decision of 6.7.2020 on records management and archives¹², ‘[d]ocuments shall be registered if they contain important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments’.

A text message or another type of instant messaging is by its nature a short-lived document which does not contain in principle important information concerning matters relating to

¹⁰ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

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

¹² https://ec.europa.eu/info/sites/info/files/c_2020_4482_en.pdf.

policies, activities and decisions of the Commission and therefore it does not normally qualify as a document fulfilling the registration criteria. In this respect, the Commission record-keeping policy would in principle exclude instant messaging.

No documents falling within the scope of your request could be identified.

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

2. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 does not need to be balanced against any possible overriding public interest in disclosure.

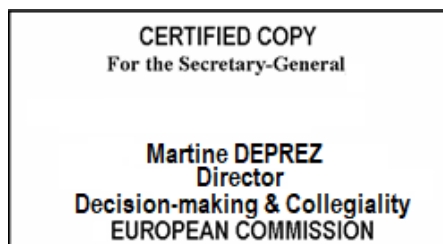
3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, partial access is granted to the documents in question.

4. 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

Enclosures: [2]