



EUROPEAN COMMISSION

Brussels, 27.2.2023
C(2023) 1509 final

Ms Vicky Cann
Corporate Europe Observatory
Rue d'Edimbourg 26
1050 Brussels

**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 – 2022/5765**

Dear Ms Cann,

I am writing in reference to your confirmatory application registered on 7 December 2022, submitted 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 apologies for delays in treating your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 10 October 2022, handled by Directorate D - Twin Transition, Economic & Social Affairs of the Secretariat-General, you requested access to:

‘[...] documents related to the Chemical Strategy for Sustainability, and in particular to the reform of the CLP and REACH Regulations:

1. A list of all meetings/ discussions that have taken place since 1st December 2021 between representatives of individual companies (including their lobby consultancies and law firms) and/or industry associations on the other hand, specifically: BDI, VCI,

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

CEFIC, Eurometaux, Bayer, BASF, PlasticsEurope, Corteva, 3M, Chemours, Corbion, Solvay, with:

- a. the President of the EU Commission and/or representatives of her cabinet (in particular Bjoern Seibert and Kurt Vandenberghe)
 - b. Vice President of the EU Commission Frans Timmermans and/or representatives of his cabinet (in particular Helena Braun)
 - c. Vice President of the EU Commission Margrethe Vestager and/or representatives of her cabinet
 - d. Vice President of the EU Commission Valdis Dombrovskis and/or representatives of his cabinet
 - e. Vice President of the EU Commission Maroš Šefčovič and/or representatives of his cabinet
2. Any records, minutes or notes of these meetings/discussions.
3. Any briefings prepared for these meetings.
4. All correspondence exchanged since 1st December 2021 (including SMS & any other type of messages processed through phone apps - eg., WhatsApp, Signal, Telegram etc, recorded voice messages, emails, letters and attached documents) between the above Commissioners and officials and representatives of the specified companies (including their lobby consultancies and law firms) and/or industry associations on the other hand.’.

The Secretariat-General has identified the following documents as falling under the scope of your request:

- Email of 2 September 2022 from Eurometaux, reference Ares(2022)6121589 (hereafter ‘document 1’), which includes the following annexes:
 - Metals for clean energy (hereafter ‘document 2’);
- Exchange of emails with CEFIC of 12 July 2022, reference Ares(2022)5066460 (hereafter ‘document 3’);
- Exchange of emails with PlasticsEurope of July 2022, reference Ares(2022)5146886 (hereafter ‘document 4’);
- Letter to CEFIC of 25 August 2022, reference Ares(2022)5925476 (hereafter ‘document 5’);
- Exchange of emails with Eurometaux of June 2022, reference Ares(2022)4716093 (hereafter ‘document 6’);
- Email from CEFIC of 30 August 2022, reference Ares(2022)7164670 (hereafter ‘document 7’), which includes the following annexes:
 - 8 point action plan (hereafter ‘document 8’);
- Meeting notes of the meeting with CEFIC of 22 September 2022, reference Ares(2022)7164878 (hereafter ‘document 9’);
- Exchange of emails of April 2022 with VCI, reference Ares(2022)7489949 (hereafter ‘document 10’);

- Email of 3 June 2022 from VCI, reference Ares(2022)7490169 (hereafter ‘document 11’), which includes the following annexes:
 - VCI action plan (hereafter ‘document 12’);
- Meeting notes of the meeting with VCI of 29 April 2022, reference Ares(2022)7490286 (hereafter ‘document 13’);
- Meeting notes of the meeting with CEFIC of 1 December 2021, reference Ares(2022)7670511 (hereafter ‘document 14’);
- Letter from CEFIC of 11 July 2022, annexed to document 3, reference Ares(2022)5066460 (hereafter ‘document 15’).

In its initial reply of 1 December 2022, Directorate D - Twin Transition, Economic & Social Affairs of the Secretariat-General granted wide partial access to these documents, subject to redactions based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. In particular, you ask for a review of the identification of the requested documents and a review of the redaction of personal data. You also recall that you had asked for ‘a list of all meetings/discussions that have taken place since 1st December 2021 with the listed organisations, their representatives, and listed Commission representatives’.

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.

Following this review, the following documents have been identified at confirmatory stage as falling within the scope of your request:

- Presentation slides Metals for clean energy, annexed to document 1 (hereafter ‘document 16’);
- CEFIC letter on CLP Regulation, annexed to document 7 (hereafter ‘document 17’).

I can inform you that:

- further access is granted to document 14;
- partial access is granted to documents 16 and 17.

As regards the redacted parts of documents 1-15, I regret to inform you that I have to confirm the initial decision of Directorate D - Twin Transition, Economic & Social Affairs of the Secretariat-General to refuse access, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001, for the reasons set out below.

As regards your request to provide you with a list of all meetings, I confirm that the Commission does not hold such a document. 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 [(EC) No] 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’³.

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 [(EC)] 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 [(EC)] No 1049/2001’⁴.

In the present case, while the Commissioners and their Cabinets keep records of meetings with organisations and self-employed individuals, neither they nor the Secretariat-General hold any list of all meetings of its staff with the specific organisations and self-employed individuals concerned by your request. In this respect, I would like to confirm that compiling such a list in order to fulfil your request would equal to creation of a new document in the meaning of the corresponding paragraphs of the judgments in Cases C-127/13 P and C-491/15 P as neither can such a list be extracted from a database by means of a normal or routine search⁵.

Moreover, there are no documents originating from or being held by the cabinets of Vice-Presidents Vestager and Dombrovskis in the scope of your request, as there are no briefings or other correspondence, be it in the form of SMS, messages transmitted through phone apps or voice recordings.

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 exist⁶. This presumption continues to apply unless the

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

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

⁵ *Typke v European Commission* judgment, cited above, paragraph 47; Judgment of the General Court of 22 October 2011, *Dufour v ECB*, T-436/09, EU:T:2011:634, paragraphs 103 and 153.

⁶ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

applicant can rebut it by relevant and consistent evidence. The Court of Justice, ruling on an appeal in Case C-440/18 P, has confirmed these conclusions⁷.

2.1. 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*)⁸, 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 data⁹ (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/EC¹⁰ (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’¹¹.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

⁷ Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18 P, ECLI:EU:C:2019:77, paragraph 14.

⁸ 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.

⁹ OJ L 8, 12.1.2001, p. 1.

¹⁰ OJ L 295, 21.11.2018, p. 39.

¹¹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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’¹².

Documents 1-17 contain personal data such as i) the names of Commission staff who do not form part of the senior management for which the institution applies wider transparency in order to reconcile the need for transparency with the protection of personal data and ii) names and contact details of representatives of different companies, which cannot be considered as public figures acting in a public capacity.

The names¹³ 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.

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 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 data¹⁴. 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.

¹² 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.

¹³ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹⁴ 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.

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.

Nonetheless, to balance the need for transparency with that of protection of personal data mentioned in Article 9(3) of Regulation (EU) 2018/1725 and after weighing in the interests of data subjects with those of transparency in Article 9(1)(b) thereof, the Commission decided to implement wider transparency to Commission members that form part of the senior management, considering that disclosing their name and function would not prejudice their legitimate interests.

Moreover, following the judgment in *Bavarian Lager* and the guidance by the European Data Protection Supervisor¹⁵, the Commission decided to apply the same wider transparency to public figures acting in a public capacity, which includes people acting within the mandate entrusted by a public authority or public office and involving public resources.

In the case of representatives of companies, even at the highest level, the Commission considers that the balancing favours, by default, protection of personal data and it is for the recipient to establish that transmission is necessary for a specific purpose in the public interest, which you did not do in this case.

Notwithstanding, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the 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 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 note also that Article 4(1)(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.

4. PARTIAL ACCESS

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

As explained above, (further) partial access is granted to documents 14, 16 and 17.

¹⁵ https://edps.europa.eu/sites/edp/files/publication/11-03-24_bavarian_lager_en.pdf.

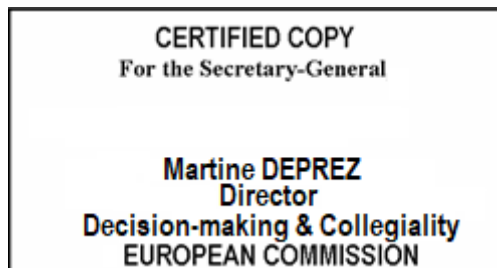
Please note that documents originating from third parties are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of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

Moreover, some documents were drawn up for internal use under the responsibility of the relevant officials of the Secretariat-General or of the Cabinet. Such documents solely reflect the author's interpretation of the interventions made and do not set out any official position of the third parties to which the documents refer, who were not consulted on their content. These do not reflect the position of the Commission and cannot be quoted as such.

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

Enclosures: (3)