

**REPLY TO CONFIRMATORY APPLICATION 16/c/01/23**  
**made by email on 11 May 2023 and registered on the same day**

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup> (hereinafter referred to as “Regulation (EC) No 1049/2001”) and Annex II to the Council’s Rules of Procedure<sup>2</sup>, and has come to the following conclusion:

1. On 9 March 2023, the Applicant submitted a request for access to “*all documents of the Working Party on Consumer Protection and Information related to the Dossier "Empowering Consumers" (2022/0092 (COD))*”, including “*for instance position papers, protocols and the results of votings.*”.
2. In its reply dated 25 April 2023, the General Secretariat of the Council (the ‘GSC’) informed the Applicant that all standard documents circulated in the Working Party on Consumer Protection and Information in relation to the said legislative file are available on the public register of Council documents and provided a link to the specific webpage. It also granted full access to twenty-three working documents related to the examination of the legislative proposal in the Working Party on Consumer Protection and Information, including Presidency discussion papers, written comments by delegations and Commission Power Point presentations. Finally, it granted partial access to one working document containing a Commission Power Point presentation and refused access to personal data contained in it, owing to the protection of personal data and pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001.
3. On 11 May 2023, the Applicant submitted a confirmatory application stating that “*position papers, protocols and the results of votings*” were missing among the documents provided by the GSC and that, according to the judgement of the General Court in case T-163/21, “*documents within the working group must be made public*”. The Applicant does not contest the refusal to release personal data in the document partially released.

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

<sup>2</sup> Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35.

4. The Council has carefully considered the confirmatory application in the light of the Applicant's considerations.
5. From the outset, it should be recalled that pursuant to Article 2(3) of Regulation (EC) No 1049/2001, public access to documents is limited to "*documents held by an institution, that is to say, documents drawn up or received by it and in its possession*". As was held by the Court in case C-491/15 P: "*the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned*".<sup>3</sup>
6. At the initial stage, the GSC has provided all documents in its possession that it has identified as relevant to the request. In particular, it has identified, in addition to all standard documents produced in the course of the examination of the legislative proposal up to the date of the request, twenty-four working documents drawn up or received by it and consisting of Presidency discussion papers, written comments from delegations and Commission Power Point presentations. These documents do cover the request of the Applicant for "*position papers*".
7. Regarding the request for "*protocols*", it should be pointed out that the Council has not an obligation to draw up minutes of all meetings of the Council's preparatory bodies and covering all items on their agendas. As was held by the Court of First Instance in its judgment in Case T-264/04<sup>4</sup>, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities. As regards the Working Party on Consumer Protection and Information, it does not usually produce minutes of its meetings. The Presidency may decide on a case-by-case basis if discussions relating to such items should be recorded in a report or other document. In this file no such record of the discussions was established and, therefore, the Council does not hold and thus cannot provide any such minutes/protocols.
8. Similarly, there is no document held by the Council that record any "*results of voting*" in this file. Indeed, in accordance with Article 19(3) of the Council's Rules of Procedure, Council's Committees or working parties are set up by, or with the approval of, Coreper

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<sup>3</sup> Judgment of the Court of Justice of 11 January 2017 in case C-491/15 P, *Typke v Commission*, EU:C:2017:5, paragraph 31 (emphasis added).

<sup>4</sup> Judgment of the Court of First Instance of 25 April 2007 in case T-264/04, *WWF v Council*, Rec.2007, p.II-911, paragraph 61.

with a view to carrying out certain preparatory work or studies defined in advance. In the present case, the Working Party on Consumer Protection and Information has examined the draft legislative act but did not vote on it. The Council observes that it has no obligation to create a document which it has been asked to grant access to, but which does not exist.<sup>5</sup>

9. By virtue of the presumption of legality attaching to EU acts, it would be incumbent on the Applicant to rebut the Council's statements in paragraphs 6, 7 and 8 above that it does not hold any such documents (whether because it has not received them or because they do not exist, respectively)<sup>6</sup> by relevant and consistent evidence.<sup>7</sup> In this regard, the Council notes that the Applicant does not attempt to do so and merely alleges that some requested documents are missing in the reply to the initial application. According to the case-law, however, such "relevant and consistent evidence", capable of putting into question the institution's statements, goes well beyond a mere 'belief' that the documents should exist<sup>8</sup> or a mere suspicion that there must be more documents than the number identified<sup>9</sup>.

## CONCLUSION

10. In the light of the above, the Council confirms that it does not hold other relevant documents covered by the Applicant's request.

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<sup>5</sup> See judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 46.

<sup>6</sup> See judgment of the General Court of 11 June 2015 in case T-496/13, *McCullough v Cedefop*, EU:T:2015:374, paragraph 50.

<sup>7</sup> See judgment of the General Court of 23 April 2018 in case T-468/16, *Verein Deutsche Sprache v Commission*, EU:T:2018:207, paragraph 35, and the case-law cited (judgment confirmed in the Order of the Court of Justice of 30 January 2019 in appeal case C-440/18P, *Verein Deutsche Sprache v Commission*, EU:C:2019:77, paragraph 14, and the case-law cited); judgment of the General Court of 25 September 2018 in joined cases T-639/15 to T-666/15 and T-94/16, *Psara et al. v European Parliament*, EU:T:2018:602, paragraph 33, and the case law cited.

<sup>8</sup> See judgment of 25 September 2018 in joined cases T-639/15 to T-666/15 and T-94/16, *Psara et al. v European Parliament*, above, paragraph 34 et seq.

<sup>9</sup> See judgment of 23 April 2018 in case T-468/16, *Verein Deutsche Sprache v Commission*, above, paragraph 37.