



EUROPEAN COMMISSION

Brussels, 25.1.2023  
C(2023) 748 final

Ms Vicky Cann  
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Rue d'Edimbourg 26  
1050 Brussels

**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 – 2022/5725**

Dear Ms Cann,

I am writing in reference to your confirmatory application registered on 25 November 2022, submitted 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').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 7 October 2022, handled by the Regulatory Scrutiny Board, you requested access to 'all RSB meeting records, lobbying materials, and other documents prepared or received in the context of the upcoming scrutiny review of the impact assessment on the REACH revision. I understand that the Commission's impact assessment is not due to reach the Regulatory Scrutiny Board until November 2022. Nonetheless I would like to specifically request the following:

a) The minutes / notes of proceedings of any 'upstream' meetings (including those held online) between the Regulatory Scrutiny Board and Commission officials on the REACH revision proposal;

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<sup>1</sup> OJ L 345, 29.12.2001, p. 94.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

b) A list of all meetings (including those held online) attended by members of the Regulatory Scrutiny Board with external stakeholders on the upcoming REACH revision plus agendas, minutes / notes of proceedings of these meetings;

c) All correspondence (including SMS & any other type of messages processed through phone apps – e.g., WhatsApp, Signal, Telegram etc, recorded voice messages, emails, letters, and attached documents) exchanged between Members of the Regulatory Scrutiny Board and external stakeholders on the upcoming REACH revision;

d) Further to GESTDEM 2022/1868, I would like to request a list of all meetings (including those held online) since 1 January 2022 between members of the Regulatory Scrutiny Board and any ‘stakeholders’. This list should include the name of the RSB representative attending, the names of the stakeholders, the date, and as much detail as possible about the topic’.

The European Commission has identified the following documents as falling under the scope of your request:

- Minutes of the Regulatory Scrutiny Board upstream meeting of 22 April 2022 reference Ares(2022)7438536 (hereafter ‘document 1’).

In its initial reply of 21 November 2022, the Regulatory Scrutiny Board in the Secretariat-General granted partial access to this document with redactions based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of the individual) and first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

This document was identified under point a) of your request. Regarding points b) and c) of your request, the Secretariat-General confirmed that the members of the Regulatory Scrutiny Board have had no meetings with external stakeholders regarding the upcoming REACH revision. Regarding point d) of your request, the Secretariat-General pointed you to the public webpage where the meetings of the the Regulatory Scrutiny Board are published: [https://commission.europa.eu/publications/meetings-regulatory-scrutiny-board\\_en](https://commission.europa.eu/publications/meetings-regulatory-scrutiny-board_en).

In your confirmatory application, you request a review of this position. In particular, you contest the redactions performed on document 1 and the full identification of documents. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

## **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.

In your confirmatory application, you note that '[your] request explained "correspondence" as "including SMS & any other type of messages processed through phone apps - eg., WhatsApp, Signal, Telegram etc, recorded voice messages, emails, letters, and attached documents". Please can you confirm that a full check of all these forms was conducted? If not, which ones have you excluded from your search and why?'

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 Commission does not hold any additional documents, in whatever form, that would correspond to the description given in your application at the date you submitted your confirmatory request.

Furthermore, following this review, I can inform you that I have to confirm the initial decision of Regulatory Scrutiny Board to refuse further access, based on the exceptions of Article 4(1)(b) (protection of privacy and integrity of the individual) and first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

## **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*)<sup>3</sup>, 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 data<sup>4</sup> (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/EC<sup>5</sup> (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.

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<sup>3</sup> 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.

<sup>4</sup> OJ L 8, 12.1.2001, p. 1.

<sup>5</sup> OJ L 295, 21.11.2018, p. 39.

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’<sup>6</sup>.

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’<sup>7</sup>.

Document 1 contains personal data such as the names and initials of persons who do not form part of the senior management of the European Commission.

The names<sup>8</sup> 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 data<sup>9</sup>. 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

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<sup>6</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>7</sup> 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.

<sup>8</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>9</sup> 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.

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.

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.

Notwithstanding the above, 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.

## **2.2. Protection of the decision-making process**

The first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 provides that 'access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.'

In your confirmatory application, you consider that the impact assessment had been submitted to the Board and therefore the decision-making process was concluded. While the impact assessment has been submitted to the Board, it is still at a preliminary stage as it has to be revised following the opinion and the therein-comprised recommendations. The Commission has not yet taken a decision on this, consequently, the decision-making process is not completed.

Furthermore, in your confirmatory application, you consider that in "the Judgment of the Court of Justice of the European Union of 4 September 2018 in Case C-57/16 P (...) the Court held that documents drawn up in the context of an impact assessment procedure for a legislative proposal constitute legislative documents that should be made directly accessible to the public pursuant to Article 12(2) of Regulation No 1049/2001 before the proposal and that access should not be denied on request." You consider that these minutes would be within scope of this ruling.

However, this judgement in the case *ClientEarth* does not procure a right of direct access, but rather indicates that an individual assessment of the request for access has to be made for each document drawn up in the context of an impact assessment. The Court of Justice held that if the Commission is of the view that full access cannot be granted to a document drawn up in the context of an impact assessment, it will have to establish that disclosure would create a serious risk undermining its decision-making process. Such a risk depends on factors such as the state of completion of the document in question and the precise stage of the decision-making process in question at the time when access to that document is refused, the specific context in which that process takes place, and the issues still to be discussed internally by the institution concerned<sup>10</sup>.

The redacted passages of document 1 contain information about several policy options that are still being explored. The Commission proposal of the revision of the REACH Regulation is currently set to be adopted in the fourth quarter of 2023. The Commission already published the inception impact assessment and conducted a public consultation. In April 2022, it produced the draft impact assessment and submitted it to the Regulatory Scrutiny Board for its opinion. The Commission services are currently still analysing the opinion of the Board and considering changes to the draft impact assessment.

At the present stage of the decision-making process, some fundamental elements of the impact assessment and its annexes are still under consideration. Internal considerations and discussions with other services will still lead to various substantial amendments. If released now, the content of the redacted parts could give rise to unnecessary misunderstandings and unwanted external pressure, thus seriously undermining the decision-making process. The revision of REACH will have significant impacts on a wide range of stakeholders, including significant costs for the chemical industry and its downstream users, potential gains for certain industry groups, impact on the environment, animal testing, and public health. In this context, industry, environmental NGOs or animal welfare organisations may try to influence the decision-making process. Such lobbying in the context of the REACH revision and of the related Chemicals Strategy for Sustainability has already been documented in the press<sup>11</sup>. Therefore the risk is very serious and real. As Commission services are still working on the file, they must be free to explore all possible options without constraint in preparation of a decision. Therefore, disclosure of the redacted information at this stage would jeopardise the decision-making process in the meaning of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

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<sup>10</sup> Judgment of the Court of Justice of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:T:2018:660, paragraph 111.

<sup>11</sup> <https://corporateeurope.org/en/2020/09/will-eu-commission-stand-firm-against-toxic-lobbying-pressure>.

Indeed, as the General Court has held, ‘the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process’<sup>12</sup>.

Consequently, I consider that there is a reasonably foreseeable and not purely hypothetical risk that public disclosure of the withheld part of document 1 would bring a serious harm to the decision-making process concerned.

In light of the above, I conclude that the concerned parts of document 1 need to be protected on the basis of the exception laid down in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 and that further access thereto must be refused.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(3) 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 do not put forward any other reasoning pointing to an overriding public interest in disclosing the documents requested than the considerations addressed in the point above.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(3) of Regulation (EC) No 1049/2001.

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.

The fact that other documents regarding the same subject matter have already been made publicly available<sup>13</sup> (for instance, in application of the Better Regulation rules and guidelines), only reinforces this conclusion.

### **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.

However, for the reasons explained above, no further meaningful partial access is possible without undermining the interests described above.

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<sup>12</sup> Judgment of the General Court of 15 September 2016, *Phillip Morris v Commission*, T-18/15, EU:T:2016:487, paragraph 87.

<sup>13</sup> See [https://ec.europa.eu/environment/chemicals/reach/reach\\_revision\\_chemical\\_strategy\\_en.htm](https://ec.europa.eu/environment/chemicals/reach/reach_revision_chemical_strategy_en.htm).

## **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*

