

## **Notice to CPVR Applicants Regarding Public Access to Documents**

### **Introduction:**

The Community Plant Variety Office (CPVO) has recently conducted a review of its policy on public access to documents. This review was undertaken to ensure that the Office's practices align with the evolving requirements for transparency and openness within the European Union, as defined in the light of the recent case law of the Court of Justice of the European Union<sup>1</sup>, while also safeguarding the legitimate interests of applicants.

The updated policy reflects the Office's commitment to providing the fullest possible access to documents in accordance with Regulation (EC) No 1049/2001<sup>2</sup> (hereinafter also referred to as the 'PA Regulation') while maintaining necessary protections for your sensitive information.

The new policy enters into force on **15 January 2025** and applies to applications and documents filed to the Office as of that date.

### **Legal Framework:**

The right of access to documents is an essential component of the principles of openness and transparency enshrined in the Treaty on European Union (TEU) and in the Treaty on the Functioning of the European Union (TFEU), to which the CPVO, as an Agency of the European Union, is bound.

In order to give the fullest possible effect to the right of public access to documents, the PA Regulation was enacted setting up the rules and procedure for addressing applications for access to documents. The PA Regulation applies to the CPVO by virtue of Article 33(a) of Regulation (EC) No 2100/1994<sup>3</sup> pursuant to which the CPVO has implemented practical arrangements<sup>4</sup> for handling requests for public access.

The main aim of the PA Regulation is to foster transparency in the EU institutions by allowing access to documents of the institutions to any natural and legal person.

### **Exceptions to disclosure:**

This Regulation also lists the exceptions to disclosure for protecting certain public and private interests. The exceptions constitute a derogation from the general rule of transparency and must, therefore, be interpreted strictly.

Notably, Article 4 of Regulation No. 1049/2001 stipulates different exceptions to the general principle of transparency. Article 4.2, first indent, establishes that institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless an overriding public interest in the disclosure applies. In order for this exception to apply, the Office needs to assess whether the disclosure of the information would undermine the protected commercial interest of the person. If this is the case, it will have to make a balance between the commercial interest and the public interest in disclosure in order

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<sup>1</sup> Judgment of 5 February 2018 *Pari Pharma GmbH v European Medicines Agency*, T-235/15, EU:T:2018:65; Judgment of 5 February 2018, *PTC Therapeutics International v EMA*, T-718/15, EU:T:2018:66; Judgment of 5 February 2018, *MSD Animal Health Innovation and Intervet international v EMA*, T-729/15, EU:T:2018:67.

<sup>2</sup> 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 (OJ L 145, 31.05.2001).

<sup>3</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ No L 227, 1.9.1994).

<sup>4</sup> Practical arrangements adopted by the Administrative Council of the CPVO on 24 March 2004, as amended by Decisions of the Administrative Council of 9 October 2014 and 19 September 2019.

to determine which interest must prevail. It has to be noted that exceptions are to be narrowly interpreted, and, therefore, only in cases of possible sensitive commercial information might the exception be applied.

In addition, according to Article 88.3 of the Basic Regulation, in cases of varieties for which material with specific components has to be used repeatedly for the production of material of varieties, at the request of the applicant for a CPVR, all data relating to components, including their cultivation shall be withheld from inspection. Thus, if the applicant makes a request for confidentiality for the above information, the Office must, under Article 88.3, withhold the documents containing the information from public inspection.

#### **How the public can access documents related to Community Plant Variety Rights (CPVR) proceedings:**

Documents of the Office related to CPVR proceedings are open to public inspection:

- Certain documents related to granted CPVRs (i.e., Variety Description, Decision on grant, Certificate) are publicly available free of charge on the [Office public register](#).
- All other documents, that are not publicly available, can be accessed by submitting a request for public access pursuant to Regulation 1049/2001.

#### **Invoking confidentiality of document submitted to the CPVO**

CPVR applicants can request to keep all or part of a document they submit to the Office confidential.

- **Point in time for the request:**

The request can be filed on submission of the document or at a later stage as long as the document has not been disclosed following a public access request. However, in the case of varieties covered by Article 88.3 BR, such a request must be filed before the grant of a CPVR.

- **Invoking confidentiality in the Technical Questionnaire:**

For certain documents containing information on the breeding scheme and genetic origin of varieties (i.e., the technical questionnaire), the CPVO implemented a specific confidentiality question enabling CPVR applicants to submit their request for confidentiality at the time of filing a CPVR application.

- If the request for confidentiality concerns material covered by Article 88.3 BR, CPVR applicants are not required to motivate their request for confidentiality.

If the Office receives a public access request to the document, it will withhold it from disclosure.

- If the request for confidentiality concerns other varieties than those covered by Article 88.3, CPVR applicants will be required, as of 15 January 2025, to justify their request by providing concrete and motivated reasons for how the disclosure of the document would undermine their commercial interests, including intellectual property, under Article 4.2, first indent, of Regulation 1049/2001<sup>5</sup>.

If the Office receives a public access request to the document, it will decide on its accessibility in light of the provisions of the PA Regulation and will take into consideration the reasons provided by the CPVR applicant to justify its confidentiality request.

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<sup>5</sup> To this end, Technical Questionnaires will contain, as of 15 January 2025, a specific text box enabling applicants to provide justifications for their confidentiality request.

The Office may conclude that it needs further information to decide on disclosure and, to that effect, upon receiving a public access request, it will consult the CPVR applicant from which the document originates pursuant to Article 4.4 of Regulation 1049/2001.

- **Invoking confidentiality for other documents:**

CPVR applicants are advised to submit documents in such a way that avoids revealing parts of the document or information that the applicant considers confidential. For example, where contracts or other documents are submitted as evidence for a transfer of rights or in the framework of the novelty assessment, certain information may be blacked out before being submitted to the Office. However, the applicant should always ensure that the document contains the required information.

CPVR applicants retain the option to ask to keep certain documents they submit to the Office confidential. Documents that might be subject to a confidentiality request include but are not limited to the following: License agreements and other contracts regulating the sale or disposal of plant material; specific clauses in CPVR transfer agreements; contracts regulating business transactions and change of ownership (e.g., mergers, acquisitions, amalgamations); security agreements (i.e., deeds of pledge); levies of execution; documents related to insolvency proceedings.

CPVR applicants shall justify their request by providing concrete and motivated reasons for how the disclosure of the document would undermine the interests protected by exceptions under Article 4.2 of Regulation 1049/2001.

The confidentiality request can be included directly in the attached document submitted, in a separate attached letter or in the message accompanying the attachment.

If the Office receives a public access request to the document, it will decide on its accessibility in light of the provisions of the PA Regulation and will take into consideration the reasons provided by the CPVR applicant to justify its confidentiality request.

The Office may conclude that it needs further information to decide on disclosure and, to that effect, upon receiving a public access request to the document, it will consult the CPVR applicant from which the document originates pursuant to Article 4.4 of Regulation 1049/2001.

**Conclusions:**

In principle, **all documents of the Office, including any document submitted by an applicant to the Office, are accessible to the public. However, certain public and private interests should be protected by way of exceptions.**

Upon receipt of a public access request, the Office proceeds with its assessment on the accessibility of the requested documents and takes a decision on disclosure. In this regard, CPVR applicants should be aware that:

- Unless it contains information related to varieties covered by Article 88.3 BR, merely requesting to keep a document confidential does not suffice to exclude it from public access. Concrete and motivated reasons as to why disclosure would harm the protected interest shall be given.
- The submission of the motivation does not automatically grant confidential treatment to the document in question. The Office will refuse access to the document only if it determines that the document pertains to an interest protected by transparency exceptions and that its disclosure would undermine such an interest, and provided that there is no overriding public interest in the disclosure of the document.

- The Office may conclude that it needs further information to decide on disclosure and, to that effect, it will consult the CPVR applicant from which the document originates pursuant to Article 4.4 of Regulation 1049/2001.
- If the Office decides to disclose a document against an applicant's opinion, it will put on hold the disclosure and notify the applicant pursuant to Article 5.6 of the Practical Arrangements indicating the remedies available to oppose any disclosure.
- The Office will, in any case, keep confidential documents or parts of documents that it considers containing information whose disclosure would clearly undermine a protected interest.
- When documents contain personal data, as defined in regulation 2018/1725, and which disclosure could undermine the protection of the rights of data subjects, the Office will assess the balance between the right to data protection and the right of public access to documents. Accordingly, any sensitive personal data is redacted from documents disclosed in response to requests for public access