



EUROPEAN COMMISSION

Brussels, 11.10.2019
C(2019) 7461 final

Ms Mute Schimpf
Friends of the Earth Europe
Rue d'Edimbourg 26
B-1050 Brussels
Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/3008**

Dear Ms Schimpf,

I refer to your e-mail of 19 July 2019, registered on 22 July 2019, in which you submit 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 ('Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 22 May 2019, addressed to the Directorate-General for Health and Food Safety, you requested access to, I quote: 'audio recording which includes item 7 of the plenary meeting of the Advisory Group on the Food Chain and Animal and Plant Health held on 26 November 2018 entitled What is next after CJEU ruling on mutagenesis?'. You stated that you are solely interested in the European Commission's interventions on this point and not in the contributions from other stakeholders present at the meeting.

In its initial reply of 4 July 2019, the Directorate-General for Health and Food Safety refused access to the requested audio recording. It invoked the exception pertaining to the protection of privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001.

Through your confirmatory application you request a review of this position.

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 my review, I regret to inform you that I have to confirm the decision of the Directorate-General for Health and Food Safety to refuse access to the requested audio recording, based on the exception protecting privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001).

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘access to documents is refused where disclosure would undermine the protection of privacy and 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.

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

³ Judgment of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59.

⁴ Official Journal L 8 of 12.1.2001, p. 1.

⁵ Official Journal L 205 of 21.11.2018, p. 39.

⁶ Cited above, paragraph 59.

The purpose of the audio recording is to enable European Commission staff to go back to the audio recording, in case of need, in order to refine the minutes of the meeting. It is not available to the general public. On the contrary, it is only available to European Commission staff.

As you know and according to Article 7 of the Rules of procedure of the Advisory Group on the Food Chain and Animal and Plant Health, draft minutes summarizing the discussion of each point on the agenda were drawn up and sent to the Group members, including your organization⁷. All comments received from the participants of the meeting concerned were incorporated in the final version of its minutes. The final minutes are made available to the general public and are published on the European Commission website.⁸

The existing audio recording consists of interventions of individuals, for example representatives of the members of the Advisory Group on the Food Chain and Animal and Plant Health and European Commission staff, not forming part of senior management, made during the meeting of this Group which took place on 26 November 2018. The captured information relates to identified or identifiable natural persons (including their names and biometric data), namely to the intervening participants and to the positions they expressed, on behalf of the authorities they represented. This information clearly constitutes personal data in the sense 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.

Against this background, the captured information has been collected in the framework of the discussions in the Advisory Group on the Food Chain and Animal and Plant Health, with the purpose of allowing *ex-post* verification of the positions expressed in the meeting, in case of need. Article 13(2) of the Standard Rules of Procedure for Standing Committees stipulate that the Committee's discussions shall be confidential⁹. These rules were adopted on the basis of Article 9 of Regulation (EU) No 182/2011¹⁰.

⁷ Official Journal L 275 of 25.08.2004, p. 17.

⁸ https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp_plenary_20181126_sum.pdf

⁹ Official Journal C 216 of 12.7.2011, p. 11.

¹⁰ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55 of 28.2.2011, p.17.

Public disclosure of audio recording which was collected for specified explicit and legitimate purposes in the context of confidential discussions would constitute a further processing in a way incompatible with those purposes. Such further processing would not be a fair and lawful processing according to Article 5 of Regulation (EU) 2018/1725.

In the *ClientEarth* case, the Court of Justice ruled that the institution does not have to examine *ex officio* the existence of a need for transferring personal data¹¹. In the same ruling, the Court stated that if the applicant has not established a need to obtain the personal data requested, the institution does not have to examine the absence of prejudice to the person's legitimate interests¹².

In your confirmatory application, you do not put forward any arguments to establish the necessity of disclosing the requested personal data contained in the audio recording you requested. According to Article 9 of Regulation (EU) 2018/1725, the recipient has to establish 'that it is necessary to have the data transmitted for a specific purpose in the public interest'. Such a specific purpose in the public interest cannot be interpreted as meaning that any general invocation of transparency is sufficient to substantiate it.

Furthermore, there are reasons to assume that the legitimate interests of the individuals concerned would be prejudiced by disclosure of the personal data captured in the audio recording, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and undermine the confidentiality of the discussions.

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 disclosure of the personal data concerned.

Article 4(1)(b) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

3. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation (EC) No 1049/2001, I have examined the possibility of granting partial access to the audio recording you requested.

In order to ensure the protection of the privacy and the integrity of the persons depicted and speaking on it, it would be necessary to use different tools in order to extract the sound from the audio recording and distort the voices. However, this manipulation is not a standard operation for the European Commission services, which do not currently dispose of the technical tools necessary for its fulfilment. Moreover, the European Commission does not hold a transcript of the audio recording. In consequence, these manipulations would result in the creation of a new document.

¹¹ Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA*, C-615/13 P, EU:C:2015:489, paragraph 47.

¹² Cited above, paragraphs 47 and 48.

This can be deduced, by analogy, from the relevant case-law. The General Court stated in its Judgement of the General Court of 2 July 2015 in Case T-214/13, *Typke v European Commission* that ‘the Commission is not obliged to communicate to an applicant under Regulation No 1049/2001 part or all of the data contained in one of its databases — or in several of them — organised according to a classification scheme not supported by that database. Such an application would require the creation of a new document and would therefore not come within the parameters of Regulation No 1049/2001’¹³.

This conclusion is further supported by the fact that in the meantime the final detailed minutes have already been made public. I conclude therefore that the recording is covered in its entirety by the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001.

4. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to 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
Deputy Secretary-General

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

¹³ Judgement of the General Court of 2 July 2015, *Rainer Typke v European Commission*, T- 214/13, EU:T:2015:448, paragraph 58.