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EUROPEAN COMMISSION

Brussels, 5.12.2018
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[redacted]
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Pesticide Action Network
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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/3883**

Dear [redacted],

I refer to your letter of 23 September 2018, registered on the next day, 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 documents[2] (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 19 July 2018, addressed to the Secretariat-General you requested documents regarding the criteria for endocrine disrupting chemicals. In particular, you requested:

'1. All documents exchanged within [the Secretariat-General] staff as well as Cabinet, from July 2013 to July 2018 on the topics endocrine active/endocrine disrupting chemicals/pesticides/biocides, (draft) criteria for endocrine disrupting properties, impact assessment on the criteria; briefings, notes, drafts, meetings, minutes, memo's, e-mails, comments, etc.

2. All documents exchanged or received by [the Secretariat-General] staff as well as Cabinet, in the interservice consultations with other DG's on endocrine disruptors from July 2013 to July 2018 on the topics endocrine active/endocrine disrupting

[1] Official Journal L 345 of 29.12.2001, p. 94.
[2] Official Journal L 145 of 31.5.2001, p. 43.

chemicals/pesticides/biocides, (draft) criteria for endocrine disrupting properties, impact assessment on the criteria; briefings, notes, drafts, meetings, minutes, memo's, e-mails, comments, etc.

3. All documents exchanged or received by [the Secretariat-General] staff as well as Cabinet, with other DG's beyond the interservice consultation from July 2013 to July 2018 on the topics endocrine active/endocrine disrupting chemicals/pesticides/biocides, (draft) criteria for endocrine disrupting properties, impact assessment on the criteria; briefings, notes, drafts, meetings, minutes, memo's, e-mails, comments, etc.

4. All documents exchanged by [the Secretariat-General], staff as well as Cabinet, with Mr. Juncker and the other Commissioners, including members of the cabinet from July 2013 to July 2018 on the topics endocrine active/endocrine disrupting chemicals/pesticides/biocides, (draft) criteria for endocrine disrupting properties, impact assessment on the criteria; all briefing notes, drafts, meetings, minutes, memo's, e-mails, comments, etc.

5. All documents exchanged by [the Secretariat-General] with external stakeholders and parties such as industry representatives, member state (representatives and experts) and scientific experts from July 2013 to July 2018 on the topics endocrine active/endocrine disrupting chemicals/pesticides/biocides, (draft) criteria for endocrine disrupting properties, impact assessment on the criteria; all briefing notes, drafts, meetings, minutes, memo's, e-mails, comments, etc.'

The European Commission has identified 95 documents and 50 annexes to these documents, which are listed in annex I of this decision, as falling under the scope of your request.

In its initial reply of 3 September 2018, Directorate E ('Policy Coordination II') of the Secretariat-General:

- informed you that 14 of the requested documents had been disclosed fully in the past, when replying to your previous initial and confirmatory requests for access to documents, registered under registration numbers GestDem 2014/138, 2016/5658 and 2016/5660;
- granted full access to seven further documents;
- informed you that wide partial access, subject only to the redaction of personal data, in accordance with Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual) was granted to 72 of the requested documents, when replying to your previous initial and confirmatory requests for access to documents, registered under registration numbers GestDem 2014/138, 2016/5658 and 2016/5660;
- granted wide partial access, subject only to the redaction of personal data, in accordance with Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual) to a further 11 documents;
- granted full access to the parts of 23 further documents to the extent that it considered that they fall within the scope of your request. The parts that were considered as falling outside the scope of your request contained information on topics other than the establishment of criteria for identifying endocrine disruptors under the legislation on pesticides and biocides;

- refused access to 18 further documents based on Article 4(3), second subparagraph of Regulation 1049/2001 (protection of the decision-making process).

In your confirmatory application, you request a review of this position.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 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 Secretariat-General wrote to you based on Article 6(3) of Regulation 1049/2001 with a view of finding a fair solution, as you had requested a review of another initial decision regarding another request for access to documents registered under registration number GestDem 2018/3739. As both reviews were to be conducted almost simultaneously by the same members of staff, the Secretariat-General proposed to conduct the requested review of your confirmatory request registered under reference number GestDem 2018/3883 and deal with an overall number of 20 documents identified as falling under your confirmatory application registered under registration number GestDem 2018/3739.

On 11 October 2018, you replied to this fair solution proposal suggesting that the Secretariat-General perform a full review of your confirmatory request registered under registration number GestDem 2018/3739 and review 20 documents of your confirmatory request registered under registration number GestDem 2018/3883.

Following your reply to the proposal for a fair solution, the Secretariat-General has limited the scope of this confirmatory review to the following documents: 11-14, 21b, 21c, 27, 31a, 31b, 32a, 32b, 52a, 55a, 56, 57, 60, 61, 68b, 72 and 95. The detailed references to these documents are included in annex I of the decision.

Following a detailed assessment of the documents in light of the provisions of Regulation 1049/2001, I can inform you that:

– full access is granted to documents 21b, 31b and 32a;

– full access is granted to the parts of document 61 to the extent that they relate to endocrine disruptors. Document 61 contains the minutes of a meeting of Heads of Cabinet that addressed a series of issues. The withheld parts do not relate to the establishment of criteria for identifying endocrine disruptors. Consequently, they do not fall within the scope of your request;

– partial access is granted to documents 14 and 21c. The partial refusal is based on Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual) for both documents. In addition, the limited redaction in document 14 is based on Article 4(3), second subparagraph and the limited redactions in document 21c are basesd on Article 4(2), second subparagraph (protection of legal advice and court proceedings) of Regulation 1049/2001;

– wide partial access is granted to documents 12-13, 27, 31a, 32b, 52a, 55a, 56, 57, 60 and 68b, subject only to the redaction of personal data, in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual);

– the initial decision of Directorate E of the Secretariat-General is confirmed as regards documents 11, 72 and 95, based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001.

The reasons for the above-mentioned redactions are set out below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that 'the 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.'

Documents 11-14, 21c, 27, 31a, 32b, 52a, 55a, 56, 57, 60, 68b, 72 and 95 contains the names and contact details of staff of the European Commission who do not form part of senior management or names and contact details of third parties who are not the main representatives of the entities that they represent. Several of these documents contain the signatures of natural persons.

These are personal data as they are linked to natural persons. As the Court of Justice has clarified, for information to be treated as 'personal data', there is no requirement that all the information enabling the identification of the data subject must be in the hands of one person. Any information that by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.[3]

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001[4] (hereafter 'Data Protection Regulation') becomes fully applicable[5].

Article 2(a) of the Data Protection Regulation provides that ''personal data' shall mean any information relating to an identified or identifiable person (…); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.' According to the Court of Justice, 'there is no reason of principle to justify excluding activities of a professional

[3] Judgment of the Court of 20 December 2017 in Case C-434/16, *Peter Nowak v Data Protection Commissioner*, request for a preliminary ruling from the Supreme Court, EU:C:2017:994, paragraphs 33-35.

[4] 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, Official Journal L 8 of 12 January 2001, page 1.

[5] Judgment of 29 June 2010 in Case C-28/08P, *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 63.

[…] nature from the notion of "private life"'[6]. The names[7] of the persons concerned, as well as the information from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.[8] Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In the judgment in the *ClientEarth* case, the Court of Justice ruled that 'whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access'[9].

I refer also to the *Strack* case, where the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data[10].

In this regard, I would like to stress that you do not establish the necessity of having the data in question transferred to you. In particular, you do not establish that it is necessary to obtain disclosure of the names of the non-senior Commission members of staff or other personal data enabling others to deduce their identity[11]. Nor do you express any specific interest in obtaining these personal data.

As for the signatures contained in the documents, which is biometric data, it is assumed that their disclosure would harm the privacy of the signatories and subject them to the risk of forgery.

Furthermore, there are reasons to assume that the legitimate interests of the individuals concerned would be prejudiced by 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.

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6 Judgment of 20 May 2003 in Joint Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v Österreichischer Rundfunk and Others,* EU:C:2003:294, paragraph 73.

7 Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

8 Ibid, paragraphs 77-78.

9 Judgment of 16 July 2015 in Case C-615/13P, *ClientEarth v EFSA*, EU:C:2015:489, paragraph 47.

10 Judgment of 2 October 2014 in Case C-127/13 P, *Strack v Commission* EU:C:2014:2250, paragraph 106.

11 Judgment of 23 November 2011 in Case T-82/09, *Dennekamp v Parliament*, paragraph 34.

Therefore, I have to conclude that the transfer of personal data through its disclosure cannot be considered as fulfilling the requirements of Regulation 45/2001.

I would also like to underline that Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the interest protected by it against a possible public interest in disclosure.

Therefore, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data contained in documents 11-14, 21c, 27, 31a, 32b, 52a, 55a, 56, 57, 60, 68b, 72 and 95 and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

2.2. Protection of court proceedings and legal advice

Article 4(2), second indent of Regulation (EC) No 1049/2001 provides that 'the institutions shall refuse access to a document where disclosure would undermine the protection of: [...] legal advice [...] unless there is an overriding public interest in disclosure.'

In its judgment in Case T-84/03, the Court of First Instance[12] underlined that the exception provided for in Article 4(2), second indent, protects two distinct interests - court proceedings and legal advice[13]. In the case at hand, the refusal of access to the withheld parts of document 21c, except for the withheld personal data, is based on a need to protect legal advice.

It needs to be recalled that the concept of 'legal advice', as well as the applicability of the exception protecting it, has been interpreted by the case law of the EU Court. Indeed, in its judgment in Case T-755/14, the General Court took the position that legal advice is 'advice relating to a legal issue, regardless of the way in which that advice is given'[14].

In the above-mentioned judgment, the General Court also explicitly underlined that 'it is irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing that advice was provided at an early, late or final stage of the decision-making process'[15]. Furthermore, according to the General Court's reasoning, 'there is nothing in the wording of the second indent of Article 4(2) of Regulation (EC) No 1049/2001 to support the conclusion that that provision concerns only advice provided or received internally by an institution'[16].

The withheld parts in document 21c, with the exception of personal data, are an opinion of the Commission Legal Service provided in the context of a fast-track interservice consultation concerning the application of the new criteria to pending procedures and

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12 Currently: the General Court.

13 Judgment of 23 November 2004, *Turco v Council*, T-84/03, EU:T:2004:339, paragraph 65.

14 Judgment of 15 September 2016, *Herbert Smith Freehills v European Commission*, T-755/14, EU:T:2016:482, paragraph 47.

15 Idem.

16 Idem, paragraph 48.

legal issues relating to it. The Legal Service had assessed the possible consequences of transitional measures, an analysis which had to be taken into account in the course of the adoption of the criteria for endocrine disruptors.

Full disclosure of the withheld parts of document 21c, at this stage, would prejudice the capacity of the Legal Service impartially to assist the European Commission, thereby depriving the institution of an essential element in the process of taking sound decisions.

Indeed, the limited withheld parts of document 21c, with the exception of personal data, are purely internal legal opinions in a matter of a sensitive nature, drafted under the responsibility of the Legal Service. Disclosure of those parts would undermine the protection of legal advice provided for under article 4(2), second indent, of Regulation (EC) No 1049/2001. As recognised by the Court of Justice, the latter exception must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice[17].

Furthermore, disclosure of these parts at this stage would seriously undermine the ability of the Commission's Legal Service effectively to defend the interests of the institution before the EU Courts on an equal footing with the other parties in anticipated future cases. The area of approvals of active substances is already particularly exposed to litigation with a large percentage of Commission Regulations that do not approve a substance being challenged by companies. In addition, the advice of the Legal Service in respect of the particularly sensitive issue of endocrine disruptors concerns many of the 48 currently pending requests for approval or renewal of approval that are in the stage of the risk management decision, i.e. the stage covered by the advice of the Legal Service. Therefore, it is highly likely that there will be multiple actions for annulment in the near future and, consequently, disclosure of the documents in question would undermine the principle of equality of arms in these expected annulment proceedings.

I therefore take the view that the limited redactions in the opinion of the Legal Service delivered in the context of a fast-track interservice consultation on the highly sensitive issue of the application of the new criteria to pending procedures and legal issues relating to it should remain confidential at present. As explained above, there is indeed a reasonable foreseeable and not hypothetical risk that public disclosure of the withheld parts, at this stage, would seriously undermine the interest of the institution in seeking and receiving frank, objective and comprehensive advice and the ability of the Commission's Legal Service effectively to defend the interests of the institution before the EU Courts on an equal footing with other parties.

3. PROTECTION OF THE DECISION-MAKING PROCESS

Article 4(3) of Regulation 1049/2001 provides that '[a]ccess 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

[17] Judgment of 1 July 2008 in Joint Cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco* v *Council of the European Union,* EU:C:2008:374, paragraph 42.

the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.'

Apart from the redactions of personal data, the limited redaction in document 14 concerns an opinion for internal use expressed by an individual staff member of the Commission on endocrine disruptors. This opinion was of a personal and preliminary nature. It was intended only for internal use and did not reflect the final views of the Commission. Public disclosure of the withheld opinion, in the sensitive context of the issue of endocrine disruptors, would create a foreseeable risk of confusion to the public about the final Commission position. In addition, vested interests could instrumentally exploit the public disclosure of a personal opinion to undermine seriously the decision-making process of the Commission in the field of endocrine disruptors. This is a concrete and realistic risk, in particular against the background of expected litigation.

Therefore, I conclude that this limited redaction in document 14 is justified based on Article 4(3), second subparagraph of Regulation 1049/2001.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2), second indent of Regulation and in Article 4(3), second subparagraph of Regulation 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 reasoning pointing to an overriding public interest in disclosing the limited withheld parts in document 21c. However, you request that the Commission put forward evidence that there is no overriding public interest justifying disclosure of the requested documents. I would like to recall that, according to settled case law of the EU Courts, it is for the applicant to show that there is an overriding public interest to justify the disclosure of the documents concerned[18].

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2), second indent and Article 4(3), second subparagraph of Regulation 1049/2001.

The fact that very wide partial access has been granted to the documents requested provides further support to this conclusion.

[18] Judgment of the Court of Justice of 2 October 2014 in Case C-127/13, *Strack v Commission*, EU:C:2014:2250, paragraph 128.

Please note also that Article 4(1)(b) of Regulation 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

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,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Martin SELMAYR
Secretary-General

Enclosures: (18)