EUROPEAN COMMISSION

Brussels, 5.12.2018
C(2018) 8470 final

[redacted]
PAN Europe
Pesticide Action Network
Rue de la Pacification 67
1000 Brussels
Belgium

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 2018/3739**

Dear [redacted],

I refer to your letter of 14 September 2018, registered on the same 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'). Please accept our apologies for the delay in responding to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 10 July 2018, addressed to the Directorate-General for Health and Food Safety, you referred to the initial decision of that Directorate-General of 31 January 2017 (Ares(2017)515094) replying to your request for access to documents registered under registration number GestDem 2016/6390. You explained that several documents were refused to you at that time, because the decision-making process was still ongoing. You indicated that 'the decision-making process is not ongoing anymore. The criteria for endocrine disrupting pesticides have been adopted and published as well as the guidance for the implementation of the criteria'. On this basis, you requested 'full access to all documents mentioned in chapter 4', mentioned in the initial reply to your request registered under registration number GestDem 2016/6390.

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

The documents mentioned in chapter 4 of the initial decision of 31 January 2017 replying to your request for access to documents were listed in two tables. Table 1 referred to the documents that related to the impact assessment, including minutes of meetings of the impact assessment steering group on the definition of criteria for the identification of endocrine disruptors, while table 2 referred to briefings prepared by staff members of the European Commission for the attention of the senior management.

In its initial reply of 27 August 2018, the Directorate-General for Health and Food Safety informed you that:

- your request concerned documents referred to in table 1 and 2 of its initial decision of 27 August 2018, which were not fully disclosed at initial or confirmatory level, namely documents 83, 86, 89, 90, 96, 97, 101, 106, 112, 258, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 275, 555, 559, 560, 563, 564, 566, 567, 571, 585 and 586 (from table 1) and documents 615 to 621, 623-634 and 636-661 (from table 2);
- documents 259, 260, 386, 458 and 462, which were considered as falling outside the scope of your request registered under registration number GestDem 2016/6390, fell outside the scope of this request as well;
- parts of document 89 fell outside the scope of your request;
- document 662, which was additionally identified in the confirmatory decision C(2017) 4050 was also included in the scope of your request;
- documents 615, 621, 623, 641 and 645 fell outside the scope of your request, as the final versions of these briefings did not contain any information regarding endocrine disruptors;
- documents 634, 650 and 655 did not exist because the meetings were either cancelled or postponed and thus the briefing requests were cancelled.

In its initial reply of 27 August 2018, the Directorate-General for Health and Food Safety:

- granted further partial access to eight documents, based on Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), second subparagraph (protection of the decision-making process);
- confirmed the wide partial access granted to documents 616, 618, 619, 621, 624, 631, 632, 638, 639, 640, 642, 643, 644, 646, 647, 649, 651, 654, 656, 657, 658, 659 and 661, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) and/or parts of the documents that did not fall within the scope of the request;
- confirmed the partial access granted to documents 617, 620, 625, 626, 627, 628, 629, 630, 633, 636, 637, 648, 652, 660 and 662, based on Article 4(3), second subparagraph (protection of the decision-making process);
- refused access to 28 documents based on Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), second subparagraph (protection of the decision-making process).

In your confirmatory application, you request a review of this position. You support your request with detailed arguments, which I address in the corresponding sections below.

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 to finding a fair solution, as you had requested a review of another initial decision regarding another wide-scoped request for access to documents registered under registration number GestDem 2018/3883. As both reviews were to be conducted almost simultaneously by the same members of staff, the Secretariat-General proposed to conduct the 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 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, this review covers all the documents falling within the scope of the confirmatory application registered under registration number 2018/3739.

In your confirmatory application, you contest the exclusion of documents 259, 260, 386, 458 and 462 from the scope of the request. I can inform you that I consider that these documents fall within the scope of your request.

You also request that the European Commission sends you 'all full documents, with all content, no parts censored, including those denied access and those with partial access'. I would like to underline that the scope of the current review is determined by the scope of your initial request, which is focused on endocrine disruptors. Some of the documents referred to in table 2 of the initial reply of 31 January 2018 are briefings, which do not contain any parts on endocrine disruptors, and thus fall outside the scope of your request (documents 615, 621, 623, 641 and 645). Other briefings contain information on endocrine disruptors, which falls within the scope of your request, but also contain information on other subject matters (documents 616-620, 624-631, 632-33, 636-640, 642-644, 646-649, 651-654 and 656-662).

Since your interest is focused on documents concerning endocrine disruptors and you request an assessment by the European Commission of the same documents before and after the finalisation of its decision-making process on this issue, documents or parts thereof that do not entail information on endocrine disruptors fall outside the scope of

your request. I understand your request for full disclosure of the documents in this context. Therefore, I can inform you that all documents or parts thereof that entail information on endocrine disruptors have been assessed again in the context of this review.

Concerning documents 634, 650 and 655, please note that these documents do not exist, because the meetings for which they were requested were either cancelled or postponed and thus the briefing requests were cancelled. Article 2(3) of Regulation 1049/2001 states that this regulation applies to documents held by an institution, that is to say, documents drawn up or received by it and in its possession. Therefore, the European Commission is not in a position to handle your request concerning documents 634, 650 and 655 because they do not exist.

Document 462 originates from the Australian authorities. According to Article 4(4) of Regulation 1049/2001, '[a]s regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.' In the context of this review, the Secretariat-General consulted the Australian authorities on the possible disclosure of the document originating from them. The Australian authorities agreed to its disclosure, subject only to the disclosure of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual).

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

- full access is granted to the annex of document 97;
- wide partial access, subject only to the redaction of personal data, is granted to documents 83, 86, 89, 90, 97, 101, 112, 258-275,[3] 386, 462, 559-560, 563-564, 566-567 and 571 based on Article 4(1)(b) (protection of privacy and the integrity of the individual);
- wide partial access, subject only to the redaction of personal data, is granted to the parts of the documents 617, 620, 625-626, 630, 633, 636-637 and 652-653 and 660, which concern endocrine disruptors, based on Article 4(1)(b) (protection of privacy and the integrity of the individual);
- partial access is granted to document 585 based on Article 4(2), second indent (protection of legal advice and court proceedings);
- partial access is granted to documents 627-629, 636, 648 and 662, based on Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), second subparagraph (protection of the decision-making process);
- the initial decision to grant wide partial access to the documents or parts thereof, which concern endocrine disruptors, is confirmed for documents 83, 106, 616, 618-

[3] Please note that document 555 is identical to document 263 and that documents 273 and 275 have an attachment each.

619, 624, 631-632, 638-640, 642-644, 646-647, 649, 651, 654, 656-659 and 661, based on Article 4(1)(b) (protection of privacy and the integrity of the individual);

– access to document 586 is refused, based on Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), second subparagraph (protection of the decision-making process).

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.'

All documents assessed, with the exception of document 585, contain names and contact details of staff of the European Commission who are not members of the senior management or names and contact details of third parties who are not the main representatives of the entities that they represent. Some of these documents contain 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, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.[4]

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[5] (hereafter 'Data Protection Regulation') becomes fully applicable[6].

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 […] nature from the notion of "private life"'[7]. The names[8] of the persons concerned, as

4 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.

5 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.

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

7 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.

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

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.[9] 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'[10].

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[11].

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 the disclosure of the names of members of staff of the European Commission who are not part of the senior management or other personal data enabling others to deduce the identity of natural persons[12]. 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.

Furthermore, there are reasons to assume that the legitimate interests of the individuals 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.

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9 Ibid, paragraphs 77-78.

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

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

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

Therefore, I conclude that the transfer of personal data through disclosure of the requested documents 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 that does not require the institution to balance the interest protected by it against a possible public interest in disclosure.

I conclude that the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified for all assessed documents[13] as there is no need to disclose publicly the personal data contained in these documents 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[14] underlined that the exception provided for in Article 4(2), second indent, protects two distinct interests: court proceedings and legal advice.[15] In the case at hand, the refusal of access to the withheld parts of document 585, 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 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'[16].

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'[17]. 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'[18].

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13 With the exception of document 585, which does not contain personal data.
14 Currently: the General Court.
15 Judgment of 23 November 2004 in Case T-84/03, *Turco v Council*, EU:T:2004:339, paragraph 65.
16 Judgment of 15 September 2016 in Case T-755/14, *Herbert Smith Freehills v European Commission*, EU:T:2016:482, paragraph 47.
17 Idem.
18 Idem, paragraph 48.

The withheld parts in document 585 reflect an opinion of the Commission's Legal Service concerning the application of the new criteria to pending procedures and 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.

Disclosure of the withheld parts of document 585, at this stage, would prejudice the capacity of the Legal Service to impartially assist the European Commission, thereby depriving the institution of an essential element in the process of taking sound decisions.

Indeed, the limited withheld parts in document 585, with the exception of personal data, are purely internal legal opinions on 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[19].

Furthermore, disclosure of these parts, at this stage, would seriously undermine the ability of the 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, as a large percentage of European Commission Regulations not approving a substance are 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 could 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 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 Legal Service effectively to defend the interests of the institution before the EU Courts on an equal footing with other parties.

[19] 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.

3. PROTECTION OF THE DECISION-MAKING PROCESS

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

Document 586 and the withheld parts of documents 627-629, 636, 648 and 662 contain individual detailed positions of Member States expressed during the procedure for the establishment of the criteria for the identification of endocrine disruptors. While document 586 is a note to a Head of Cabinet including a detailed description of such individual positions of several Member States, documents 627-629, 636, 648 and 662 are briefings, which partly refer to such positions.

The rules applicable to comitology procedures – and by extension the rules applicable to the preparation and adoption of delegated acts – preserve the confidentiality of the individual positions of the Member States. As explained already in the confirmatory decisions of 8 June 2017 and 9 November 2017 concerning your application registered under registration number GestDem 2016/6390, the Standard Rules of Procedure adopted by the European Commission pursuant to Article 9 of Regulation (EU) No 182/2011[20] (the 'Comitology Regulation'), explicitly exclude the positions of individual Member States from public access. Indeed, Articles 10(2) and 13(2) of the Standard Rules of Procedure provide, respectively, that summary records of the meetings shall not mention the position of individual Member States in the committee's discussions and that those discussions shall remain confidential. In addition, Article 10 of the Comitology Regulation limits the scope of the documents to be made publicly available via the Comitology Register. The documents reflecting the individual positions of the Member States are not among the documents to be disclosed.

It follows that the European Commission cannot grant public access under Regulation 1049/2001 to documents containing references to the individual Member States that expressed opinions in the framework of committee meetings, as this would result in the above-mentioned confidentiality requirements being deprived of their meaningful effect. Such a public disclosure would undoubtedly affect mutual trust between the European Commission and the Member States and would therefore be at odds with the principle of sincere cooperation. The capacity of the European Commission to conduct efficiently the preparatory phases of the adoption of implementing and delegated acts would be seriously undermined if that confidentiality were not protected.

[20] 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. 13–18 .

This is a concrete and realistic risk, as public disclosure of the individual positions of Member States, against the explicit rules on confidentiality, would certainly undermine the trust between the Member States and the European Commission. This would seriously undermine the decision-making process of the European Commission, as it would jeopardise the effectiveness of its work.

Therefore, I conclude that the refusal of document 586 and the limited redactions in the documents 627-629, 636, 648 and 662 are 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 refer to your mission to inform and engage the public. You ask the European Commission to put forward proof that there is no overriding public interest in 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[21]. The reference to the mission of your organisation is not an element that can be taken into account in the context of public access to documents. The EU Courts have repeatedly stated that the right of access to documents does not depend on the nature of the particular interest, which the applicant for access may or may not have in obtaining the information requested[22].

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.

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.

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

22 Judgment of the General Court of 13 November 2015 in Joined Cases T-424/14 and T-425/14, *ClientEarth v Commission*, EU:T:2015:848, paragraph 121.

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 European Commission
Martin SELMAYR
Secretary-General

Enclosures: (50 documents and 3 attachments)