



## EUROPEAN COMMISSION

Secretariat-General

The Secretary-General

Brussels, 28.4.2017  
C(2017) 2996 final

Olivier Hoedeman  
Corporate Europe Observatory  
Rue d'Edimbourg 26  
1050 Bruxelles

### **DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2017/651**

Dear Mr Hoedeman,

I refer to your e-mail of 24 March 2017, 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<sup>2</sup> ('Regulation 1049/2001').

#### **1. SCOPE OF YOUR REQUEST**

In your initial application, you requested access to:

- *minutes and other reports of meetings between the European Commission's DG GROW and representatives of Pack2Go Europe and/or International Paper and/or Serving Europe and/or Eamonn Bates Europe Public Affairs, in which the Commission proposal for a Directive amending Directive 94/62/EC on packaging and packaging waste was discussed (between November 2014 and today);*

---

<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

- *all correspondence (including emails) between the European Commission's DG GROW and representatives of Pack2Go Europe and/or International Paper and/or Serving Europe and/or Eamonn Bates Europe Public Affairs, in which the Commission proposal for a Directive amending Directive 94/62/EC on packaging and packaging waste was discussed (between November 2014 and today).*

In its initial reply of 22 March 2017, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) identified three position papers, signed by Pack2Go Europe, as falling under the scope of your request. These position papers, which are also accessible on-line, were provided to you in full. DG GROW further provided you with the following redacted emails and pointed out that the parts redacted either constituted text unrelated to your request or personal data:

- (1) Email from European Packaging sent to the Commission on 10 March 2015, ARES (2017) 1875968;
- (2) Email from European Packaging sent to the Commission on 11 March 2015, ARES (2017) 1875860;
- (3) Email from European Packaging sent to the Commission on 21 September 2015, ARES (2017) 1875860;
- (4) Email from European Packaging sent to the Commission on 18 September 2015, ARES (2017) 2126573, which was forwarded internally within DG GROW on 20 September 2015 for information.

Through your confirmatory application you request a review of this position and ask for *the full, original version of these documents, without text having been expunged*. In view of the above, I understand that you contest the redactions by DG GROW of both (i) those parts in the above-mentioned emails, which were found not relevant for your request, and (ii) the personal data contained therein.

I will consequently review these two aspects of your request 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 or service concerned at the initial stage.

*As regards the redaction of the parts unrelated to your request:*

I recall that in your request for access to documents, sent to the Commission on 6 February 2017, you asked for all correspondence (including emails) between the Commission and four organisation/trade associations/companies, namely:

- (i) Pack2Go Europe;
- (ii) International Paper;
- (iii) Serving Europe and

(iv) Eamonn Bates Europe Public Affairs.

You further specified that the correspondence should concern the Commission's proposal for a Directive amending Directive 94/62/EC on packaging and packaging waste and be within a period as from November 2014 until present.

The three position papers that were identified by DG GROW and disclosed to you fully at the initial stage represent the position of Packaging Value Chain Industries on the proposed revision of Packaging and Packaging Waste Directive. These papers were drafted after November 2014 and signed by a number of organisations, including by Pack2Go Europe – an organisation specifically mentioned in your request and listed above under point (i).

The four emails identified by DG GROW are the emails by which the said position papers were transmitted to the Commission. These cover emails, however, were not sent to the Commission by Pack2Go Europe or any of the other three organisations listed by you as falling within the scope of your request. The originator/author of the emails is a representative of another organisation, namely EUROPEN. Correspondence with the latter, however, was not covered by your request. Indeed, the parts redacted by DG GROW in the said emails concern the position of EUROPEN regarding the Packaging and Packaging Waste Directive.

Given that you put forward an exhaustive list of organisations in your request and EUROPEN was not one of them, I consider that the relevant parts redacted from the above-mentioned emails (other than personal data) that represent the views of EUROPEN do indeed fall outside the scope of your initial request for access of 6 February 2017. I confirm therefore the position of DG GROW in this regard.

I note, however, that in your confirmatory request you argue that your request covers *correspondence in which the Commission's proposal for the Packaging and Packaging Waste Directive* was discussed. It is beyond doubt that such formulation goes beyond the clear wording and the scope of your initial request as formulated in your email of 6 February 2016. Therefore and in light of the wider definition of your request at the confirmatory level, I consider that any new elements - such as new organisation(s) covered by your request and possibly a new temporal scope of the request - cannot be subject to a confirmatory review at present, as they have not yet been handled by the Commission at the initial level.

Should you wish to pursue this matter further, you could submit a new initial request for access to the Commission on the basis of Article 6(1) of Regulation 1049/2001. This new request will be dealt with by the Commission service in charge of the underlying subject matter.

*As regards the redaction of personal data:*

Article 4(1)(b) of Regulation 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.*

As DG GROW explained in its initial reply, parts of the redactions in the emails requested contain personal data. Indeed, personal names (with the exception of the Commission senior management), email addresses and direct telephone lines of either Commission staff members or third parties were redacted from the correspondence.

These data undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001<sup>3</sup>, which defines personal data as *any information relating to an identified or identifiable natural 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*.

In consequence, the public disclosure of these data in the requested documents would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling<sup>4</sup>, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. 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.<sup>5</sup> Only if both conditions are fulfilled and the processing is lawful in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

I would also like to bring to your attention the recent judgment in the *ClientEarth* case, where 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*.<sup>6</sup>

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<sup>7</sup>.

In this regard, I would like to stress that neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Therefore, I have to conclude that the transfer of personal data through the wider disclosure of the requested documents cannot be considered as fulfilling the requirement of lawfulness provided for in Article 5 of Regulation 45/2001.

---

<sup>3</sup> 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> Judgment in *Commission v Bavarian Lager*, case C-28/08 P, EU:C:2010:378.

<sup>5</sup> *Ibid.*, paragraphs 77 to 78.

Consequently, 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 included therein and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

The fact that, the exception of Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

### **3. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting further partial access to the emails requested. However, as the withheld parts falling within the scope of your request concern personal data only, no meaningful further partial access is possible without undermining the interests described above.

### **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 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  
Alexander ITALIANER  
Secretary-General*

---

<sup>6</sup> Judgment in *ClientEarth and PAN Europe v EFSA*, case C-615/13 P, EU:C:2015:489, paragraph 47.

<sup>7</sup> Judgment in *Strack v Commission*, case C-127/13 P, EU:C:2014:2250, paragraph 106.