EUROPEAN COMMISSION

Brussels, 19.12.2017
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Ms Natacha CINGOTTI
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B-1000 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[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2017/5936**

Dear Ms Cingotti,

I refer to your letter of 8 November 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[2] ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 13 October 2017, addressed to the Directorate-General for Health and Food Safety ('DG SANTE'), you requested access to documents containing the lists of participants to the meetings of the Working Group on Food Contact Materials of the Toxicological Safety section of the Standing Committee on Plants, Animals, Food and Feed, which took place on 30-31 January 2017 and on 4-5 May 2017, respectively.

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

The Commission has identified the following documents as falling under the scope of your request:

(1) Attendance list to Working group meeting on food contact materials, Directorate-General for Health and Food Safety, 30-31 January 2017 ('Document 1'); and

(2) Attendance list to Working group meeting on food contact materials, Directorate-General for Health and Food Safety, 4-5 May 2017 ('Document 2').

These documents were drafted as part of the meetings of the Working Group on Food Contact Materials of the Toxicological Safety section of the Standing Committee on Plants, Animals, Food and Feed, which took place on 30-31 January 2017 and on 4-5 May 2017, respectively.

In its initial reply of 20 October 2017, DG SANTE granted access to these documents, subject only to redactions of personal data, pursuant to the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position. You underpin your request with detailed arguments, which I will 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, I am pleased to inform you that further access is provided to document 2, namely to the information which, at the initial stage, was erroneously redacted as personal data (i.e. information relating to the administrations/institutions the participants represented at the meeting). As regards the (remaining) redacted parts in documents 1 and 2, I regret to inform you that I have to confirm the initial decision of DG SANTE to refuse full access to those documents, based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out below.

Article 4(1)(b) of Regulation 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 the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation 45/2001[3] becomes fully applicable[4].

[3] 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

The Court stated that Article 4(1)(b) *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 Regulation No 45/2001*[5].

Article 2(a) of Regulation 45/2001 provides that *'personal data' shall mean any information relating to an identified or identifiable person.*

The requested documents contain names, contact details and signatures of Commission, European Food Safety Authority ('EFSA') and Member States staff not forming part of senior management. This information, from which the identity of the individuals can be deduced, clearly constitutes personal data in the sense of Article 2(a) of Regulation 45/2001. Its public disclosure would therefore constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

Pursuant to Article 8(b) of Regulation 45/2001, the Commission can only transmit personal data to a recipient subject to Directive 95/46/EC 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.[6] 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 *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 data. 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 interests[7].

In that context, 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[8].

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bodies and on the free movement of such data (Official Journal L 8 of 12.1.2001, p. 1) – hereinafter referred to as 'Regulation 45/2001'.

[4] Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, Case C-28/08P, EU:C:2010:378, paragraph 59.

[5] Ibidem.

[6] Ibidem, paragraphs 77-78.

[7] Judgment of the Court of Justice of 16 July 2015, *ClientEarth v EFSA,* C-615/13P, EU:C:2015:489, paragraphs 47-48.

[8] Judgments in *Bavarian Lager*, EU:C:2010:378, paragraphs 77-78; *Strack*, C-127/13 P, EU:C:2014:2250, paragraphs 107 -108; and also *Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 85.

In the *Bavarian Lager* ruling, the Court of Justice stated that the necessity of transfer must be demonstrated *by express* and *legitimate justifications* or *convincing arguments*[9].

In your confirmatory application, you indicate that [t]*he objective of the initial application is to understand* […] *how DG Santé manages the main consultation process on the important topic of health and safety in relation to food contact materials.* […] *The meetings of this working group are attended by national and EU officials acting in their professional duties of civil servants.* […] *Therefore it is hard to understand why the identity of the working group members should be kept confidential.*

In this context, the Court of Justice has confirmed in its *Rechnungshof* ruling[10], that *there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life.*

I note that, whereas the individuals participating in the working group indeed act in their professional capacity, they do not represent their personal viewpoints, but the viewpoints of their respective institutions and bodies.

Therefore, the disclosure of the participants' identity would not add to the knowledge about working methods or decision-making processes of the respective working group as these participants act on behalf of their respective institutions and bodies.

Furthermore, summaries of the working group's meetings are publically available on the Commission's website[11], including a list of participating institutions and bodies, and the viewpoints they expressed in the meetings. DG SANTE has also provided you with a list of relevant national contact details.

In light of this, wide transparency has already been given to the respective consultation process managed by DG SANTE.

According to the *Dennekamp* judgment, if the condition of necessity laid down by Article 8(b) of Regulation 45/2001, which is to be interpreted strictly, is to be fulfilled, it must be established that the transfer of personal data is the most appropriate means for attaining the applicant's objective, and that it is proportionate to that objective[12].

In my view, the transfer of personal data of the non-senior staff of the Commission, EFSA and Member States would go beyond what is necessary for attaining your objective (i.e. *to understand how* […] *DG Santé manages the main consultation process on the* […] *topic of health and safety in relation to food contact materials*).

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[9] Judgment in *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 78.
[10] Judgment of the Court of Justice of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, EU:C:2003:294, paragraph 73.
[11] https://ec.europa.eu/food/safety/chemical_safety/food_contact_materials/consultation_en
[12] Judgment of the General Court of 15 July 2015, *Dennekamp v European Parliament,* T-115/13, EU:T:2015:497, paragraph 77.

You furthermore argue that *the appropriate regulation of food contact materials is a topic of increasing concern.* […] *Against this background, the applicant would like to remind the European Commission that openness is a key principle of the European Union.*

Please note in this respect that the Court of Justice has confirmed in its *Strack* judgment that a mere interest of members of the public in obtaining certain personal data cannot be equated with a necessity to obtain the said data in the meaning of Regulation 45/2001[13].

Furthermore, Commission, EFSA and Member State officials not holding any senior management position are not directly accountable to the general public, but to their respective institutions.

Against this background, I consider that you have not established the necessity of transfer of the respective personal data. Consequently, your argument that, in its initial reply, *DG Santé* [did] *not explain how the release of the requested documents would prejudice the data subjects*, is irrelevant.

As indicated above, the Court of Justice has confirmed 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 interests.[14]

Even if the necessity was established (*quod non*), there is a reason to believe that the interests of the data subjects of the request might be prejudiced. Indeed, the disclosure of their personal data may cause that the data subjects would be contacted or confronted on a personal basis or in their personal lives (e.g. in the context of the political initiatives outlined in your confirmatory application) on matters under the remit and control of their respective institutions or bodies. Therefore, there is a foreseeable and not purely hypothetical risk that the data subjects' legitimate interests would be prejudiced.

Furthermore, as to the signatures appearing in the documents, which are biometric data, I am of the view that the disclosure would also prejudice the legitimate interests of the persons concerned as it would expose them to the risk of forgery.

I conclude that 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 in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

Finally, I would like to recall that Article 4(1)(b) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

[13]Judgment of the Court of Justice of 2 October 2014, *Strack v Commission,* C-127/13, EU:C:2014:2250, paragraphs 107 and 108.
[14] Judgment of the Court of Justice of 16 July 2015, *ClientEarth v EFSA,* C-615/13P, EU:C:2015:489, paragraph 47-48.

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 documents requested. However, for the reasons explained above, no meaningful further access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that the redacted parts of the documents requested are covered in their entirety by the invoked exception to the right of public access.

4. 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
Alexander ITALIANER
Secretary-General