



EUROPEAN COMMISSION

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Mr Andreas PAVLOU
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Spain

DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE 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 2016/4842 and 2016/4845

Dear Sir,

I refer to your letter of 1 November 2016, registered on 3 November 2016, wherein 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 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application GestDem 2016/4842 of 1 September 2016, addressed to the Directorate-General for Health and Food Safety ('DG SANTE'), you requested access to *documents which were referred to in the letter sent by the Directorate General for Health and Food Safety to the European Food Safety Agency (Ref Ares(2016)2701336 – 10/06/2016)*.

In your initial application GestDem 2016/4845 of 1 September 2016, addressed to DG SANTE, you requested access to *all other information that is not mentioned in Ares (2016)2701336 – 10/06/2016 (i.e. the documents which contain the following information: any minutes of meetings, analyses and reports (produced and/or received by EU bodies), emails and/or other communications related to the presence of teosinte (Zea mays spp) in Spain and in the European Union)*.

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

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

DG SANTE identified 65 documents as falling under the scope of both your initial applications. In its initial reply of 10 October 2016, DG SANTE fully disclosed 34 documents, partially disclosed 29 documents and refused access to two documents. The (partial) refusal was based on the exceptions laid down in Articles 4(1)(b) (protection of privacy and the integrity of the individual) and/or 4(3), first and second subparagraphs (protection of the decision-making process), of Regulation 1049/2001.

Through your confirmatory application you request a review of the position of DG SANTE as regards the following four documents:

- document 14: exchange of e-mails between French authorities and DG SANTE of 24 May 2016 (Ares(2016)2680587). As DG SANTE invoked the exception laid down in Article 4(3), second subparagraph, of Regulation 1049/2001 only with regard to the second part of this document (email from the French authorities), the first part of this document (email from the Commission) is considered to fall outside the scope of your application;
- document 16: note from the Directorate-General for Environment ('DG ENV') to DG SANTE of 1 June 2016 (ISC/2016/01312, ISC/2016/01316 and ISC/2016/01321);
- document 17: e-mail from the French authorities to DG SANTE of 1 June 2016 (Ares(2016)5045651);
- document 22: e-mail from DG SANTE to DG ENV of 15 June 2016 (Ares(2016)5462768).

Access to these documents was either partially refused (i.e. documents 14 and 16) or fully refused (i.e. documents 17 and 22) at the initial level, based on the exceptions laid down in Article 4(1)(b) and/or Article 4(3) of Regulation 1049/2001. In your confirmatory application, you contest the application of the exceptions laid down in Article 4(3) of Regulation 1049/2001.

I note that you do not contest the application of the exception laid down in Article 4(1)(b) of Regulation 1049/2001 to the personal data contained in the 27 partially disclosed documents, which were subject only to this exception. The personal data in these documents are therefore excluded from the scope of your confirmatory application.

I would also like to draw your attention to the fact that all four documents requested were identified as falling under the scope of your initial application GestDem 2016/4845. As you do not request wider access to any of the other 27 partially disclosed documents (16 of them falling under the scope of your initial application GestDem 2016/4842), I consider that the position of DG SANTE concerning your initial application GestDem 2016/4842 is excluded from the scope of your confirmatory application.

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.

Following this review, I am pleased to inform you that wide partial access is provided to all four requested documents, as indicated below.

Documents 14 (second part) and 17 originate from the French authorities. At the initial stage, the French authorities opposed the disclosure of their documents pursuant to the exception laid down in Article 4(3), second subparagraph, of Regulation 1049/2001. At the confirmatory stage, the Secretariat-General consulted the French authorities anew in line with Article 4(4) and 4(5) of Regulation 1049/2001, in order to verify whether they maintained their initial position. The French authorities agreed with wider partial access to both documents by redacting only the personal data contained therein based on the exception laid down in Article 4(1)(b) of Regulation 1049/2001.

Documents 16 and 22 are Commission documents. Whereas wide partial access is provided to these two documents, certain parts thereof (i.e. personal data contained therein) still need to be protected from disclosure, based on the exception laid down in Article 4(1)(b) of Regulation 1049/2001.

Consequently, the withheld parts of documents 14, 16, 17 and 22 fall under the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out below.

2.1. Protection of privacy and the integrity of the individual

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.*

In accordance with the *Bavarian Lager* ruling³, when a request is made for access to documents containing personal data, Regulation 45/2001⁴ becomes fully applicable. Article 2(a) of Regulation 45/2001 defines personal data as *any information relating to an identified or identifiable natural person.*

In this instance, all four documents contain information related to identified or identifiable individuals (which are non-senior officials), in particular their names and contact data.

³ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378.

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 12.1.2001, p. 1) – hereinafter referred to as ‘Regulation 45/2001’.

Pursuant to settled case law, *the concept of 'private life' must not be interpreted restrictively and [...] there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'*⁵.

The names and contact data of individuals clearly constitute personal data within the meaning of Article 2(a) and their disclosure would, thus, constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

According to Article 8(b) of Regulation 45/2001, 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 cumulative⁶ and only the fulfilment of both conditions and the lawfulness of processing in accordance with the requirements of Article 5 of Regulation 45/2001 enables one to consider the processing (transfer) of personal data as compliant with the requirements of Regulation 45/2001.

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. 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 interests⁷.

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 access⁸.

In the above-mentioned *Bavarian Lager* ruling, the Court of Justice has clarified that the necessity of transfer must be demonstrated *by express and legitimate justifications or convincing arguments*⁹.

Neither in your initial request, nor in in your confirmatory application, have you stated any grounds to substantiate the necessity of transfer of personal data contained in the requested documents. Consequently, the personal data in the documents requested may not be disclosed as the need to obtain those personal data has not been substantiated, and there is reason to assume that the data subjects' legitimate interests might be prejudiced.

⁵ See, *inter alia*, judgment of 20 May 2003, *Österreichischer Rundfunk*, C-465/00, EU:C:2003:294, paragraph 73.

⁶ Judgment in *Bavarian Lager*, EU:C:2010:378, paragraphs 77-78.

⁷ Judgment 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.

⁹ Judgment in *Bavarian Lager*, EU:C:2010:378, paragraph 78.

Against this background, I must conclude that the transfer of personal data contained in all four documents cannot be considered as fulfilling the requirements of Regulation 45/2001 and that such a transfer is consequently also prohibited under Article 4(1)(b) of Regulation 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note 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.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. Consequently, the requested documents are disclosed subject to the redaction of personal data only.

5. LEGAL NOTICE

Please note that the Commission received the second part of document 14 (as described in Section 1 of this decision) and document 17 from the French authorities. These documents are partially disclosed for information only. They do not reflect the position of the Commission and cannot be quoted as such.

6. 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*

Appendices:

- Redacted document 14 (Ares(2016)2680587);
- Redacted document 16 (ISC/2016/01312, ISC/2016/01316 and ISC/2016/01321);
- Redacted document 17 (Ares(2016)5045651);
- Redacted document 22 (Ares(2016)5462768).