EUROPEAN COMMISSION

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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 2018/2228**

Dear Mr Bär,

I refer to your email of 29 June 2018, registered on 4 July 2018, by 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 19 April 2018, dealt with by the Directorate-General for Health and Food Safety, you requested access to 'the agenda, minutes and list of attendees of the meeting of the C[omprehensive] E[conomic] [and] T[rade] A[greement][3] S[anitary] [and] P[hytosanitary] Joint Management Committee, which took place the 26th and 27th of March 2018 in Ottawa, and all documents and presentations, which were discussed during this meeting.'

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

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.
3 CETA.

- Agenda of the meeting of 26-27 March 2018 (hereafter 'document 1');
- Report from the meeting of 26-27 March 2018 (hereafter 'document 2');
- Full minutes of the meeting of 26-27 March 2018 (hereafter 'document 3')[4].

In its initial reply of 21 June 2018, the Directorate-General for Health and Food Safety informed you that documents 1 and 2 are publicly available on the *Europa* website[5]. It also provided you general information about the meeting in question, such as who chaired the meeting and who participated in it. With regard to the list of attendees, the Directorate-General for Health and Food Safety refused access thereto, based on the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position.

In particular, you argue that the publicly accessible report (document 2) may not be the only document held by the European Commission reflecting the discussion during the meeting in question.

In this regard, I confirm that document 3 contains the full minutes of the meeting in question.

In your confirmatory application you also maintain your request for access to the attendance list. However, you explicitly underline that '[you] fully accept that [the European Commission] cannot give [you] the names of the people present at the meeting'.

I would like to clarify in this respect that the list of the individuals present during the meeting in question is included in the opening part of document 3. With regard to the entities and organisations that these individuals represented during the meeting, I would like to refer to section 5 of this decision.

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 regret to inform you that access is refused to document 3, based on the exceptions protecting respectively:

- the public interest as regards international relations, provided for in Article 4(1)(a), third indent, of Regulation 1049/2001,

[4] Document 3 was not referred to in the initial reply of the Directorate-General for Health and Food Safety. The European Commission identified it at the stage of handling of the confirmatory application.

[5] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1811.

- privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001,
- decision-making process, provided for in Article 4(3), first subparagraph of Regulation 1049/2001.

In the above-mentioned assessment, I took into account the position of the authorities of Canada, consulted in line with the provisions of Article 4(4) of Regulation 1049/2001.

The detailed reasons are set out below.

2.1 Protection of the public interest as regards international relations and of the decision-making process

Article 4(1)(a), third indent, of Regulation 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards […] international relations'.

Article 4(3), first subparagraph of Regulation 1049/2001 provides that 'access 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 the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

In the case at hand, the two above-mentioned exceptions are interlinked and therefore the corresponding reasons justifying their applicability are closely related.

Document 3 contains the text of minutes agreed between the representative of the EU and the Canadian authorities, following the meeting of the Comprehensive Economic and Trade Agreement Sanitary and Phytosanitary Joint Management Committee, which took place on 26 and 27 March 2018.

The Committee was established under Article 26(2)(1)(d) of the Comprehensive Economic and Trade Agreement[6] (hereafter: 'the Agreement') to discuss at the technical level the practical aspects of implementation of the Agreement, in so far as sanitary and phytosanitary aspects of trade between the EU and Canada are concerned. The process of implementing the Agreement is at its early phase and is fully ongoing. Indeed, the above-mentioned meeting of 26 and 27 March 2018, to which the minutes requested refer, was the first meeting of the Committee. The document requested contains technical details of the topics discussed, such as issues relating to export of various products, the means aimed at aligning phytosanitary measures, and mutual recognition of the sanitary and phytosanitary standards.

[6] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Official Journal L 11 of 14 January 2017, page 23.

Public disclosure of the above-mentioned technical details would jeopardise the progress and affect the process of implementing the Agreement. Its successful implementation depends to a large extent on the cooperation of the parties and mutual trust is needed in addressing different aspects of the Agreement.

As mentioned above, the discussions in the Committee are held at technical level and therefore the information included in the document in question is also of a technical character. If publicly disclosed, it could be subject to misinterpretation or misuse. That in turn, would put the EU and Canada in a difficult position, as a result of which the possibility to gain progress in the discussions within the Committee would be negatively affected.

Consequently, the ongoing decision-making process linked to the implementation of the Agreement in the context of sanitary and phytosanitary issues would be seriously undermined. Furthermore, such public disclosure would also impact the relationship of mutual trust in other specialised Committees established to discuss other aspects of the implementation of the Agreement.

It is important to highlight that on 16 July 2018, the Council of the European Union adopted a Decision 2018/1062[7], providing for the Rules of procedure of the Joint Committee and specialised committees under the Agreement.

With regard to the minutes, Rule 9 provides for that minutes will 'as a general rule, summarise each item on the agenda, specifying where applicable: (a) the documents submitted to the CETA Joint Committee; (b) any statement that a member of the CETA Joint Committee requested to be entered in the minutes; and (c) the decisions adopted, recommendations made, joint statements decided upon and operational conclusions adopted on specific items'. The minutes will also 'include a list of names, titles and affiliations, of all individuals who attended the meeting in any capacity'. Document 3 contains the above-mentioned (full) minutes. Furthermore, Rule 9 expressly provides that only a 'summary' of the minutes will be made public 'subject to the application of Article 26.4 of the Agreement'. The European Commission indeed published that summary, as explained by the Directorate-General for Health and Food Safety in its initial reply.

Article 26.4 of the Agreement provides that 'when a Party submits to the CETA Joint Committee or any specialised committee established under this Agreement information considered as confidential or protected from disclosure under its laws, the other Party shall treat this information as confidential'. That provision is furthermore reflected in Rule No 11[8].

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[7] Council Decision (EU) 2018/1062 of 16 July 2018, on the position to be adopted on behalf of the European Union within the CETA Joint Committee established by the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of the Rules of Procedure of the CETA Joint Committee and specialised committees, Official Journal L 190, 27 July 2018, page 13.

[8] Rule No 11 reads as follows: 'Rule 11 - Publicity and Confidentiality. 1. Unless otherwise specified by the Agreement or decided by the co-chairs, the meetings of the CETA Joint Committee will not be

That provision and the Rules have been extensively discussed between the EU and the Canadian counterparts before their adoption and the principles in question reflect the expectations of the Canadian counterparts concerning information that is to be put in the public domain. In other words, the Canadian counterparts would not understand and accept to have the full minutes be made public, while Rule No 9 provides that only the summary of the minutes will be made public.

Thus, the EU and Canada have agreed in the above-mentioned Rules of Procedure to inform citizens and stakeholders on the discussions taking place in the context of the Committees via summaries of minutes and reports of the meetings (document 2) (and public agendas (document 1) – see Rule No 8), that are publicly available on the *Europa* website[9]. The summaries of minutes and reports of the meetings/document 2 inform about the content and outcome of the discussions, while safeguarding the space necessary for both parties to make progress on different files and ensure correct implementation of the Agreement, while disclosing the full minutes/document 3 would not.

Consequently, the public disclosure of the document 3 would not only, as explained above, undermine the ongoing decision-making process, but also the public interest as regards international relations. Indeed, its public disclosure against the line agreed with the Canadian counterparts as reflected in the Rules of procedure would affect the dialogue and discussion within the CETA Sanitary and Phytosanitary Joint Management Committee, as well as within other committees under the Agreement to which the above-mentioned Rules also apply. That would affect, in turn, the appropriate and smooth implementation of the Agreement as a whole, which is of strategic interest of the European Union, and at the end of the day that would undermine the interests of the citizens, consumers and economic operators who take advantage from the Agreement

I consider this risk as reasonably foreseeable and not purely hypothetical.

Having regard to the above, I consider that the use of the exceptions under Article 4(1)(a), third indent (protection of the public interest as regards international relations) and Article 4(3), first subparagraph, of Regulation 1049/2001 is justified concerning document 3 and that access thereto must be refused on that basis.

2.2 Protection of the privacy and 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'.

Although in your confirmatory application you do not contest the position of the Directorate-General for Health and Food Safety refusing access to the personal data

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open to the public. 2. When a party to the Agreement submits information considered as confidential or protected from disclosure under its laws and regulations to the CETA Joint Committee or any specialised committee or other body established under the Agreement, the other Party to the Agreement shall treat that information as confidential as provided in Article 26.4 of the Agreement'.

9 See footnote 5 above.

concerned, I would like to provide additional explanations on how the disclosure of the (parts of) document 3 would undermine the interests protected by this exception.

The relevant undisclosed parts of the above-mentioned document contain the names and surnames of staff members of the European Commission not holding any senior management position. It also contains the names and surnames of third party representatives (Canadian and EU Member State ministries and organisations). The document also contains biometric data – handwritten signatures of the chairs of the meeting).

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001[10], which defines it 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'.

It follows that public disclosure of all the above-mentioned personal information 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[11], 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[12].

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In its judgment in the *ClientEarth* case, the Court of Justice ruled that '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'[13]. I also refer to the *Strack* case, where the Court of Justice ruled that the

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10 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.

11 Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd*,(ECLI:EU:C:2010:378), paragraph 63.

12 Ibid, paragraphs 77-78.

13 Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:489), paragraph 47.

Institution does not have to examine by itself the existence of a need for transferring personal data[14].

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing the personal data included in the document 3.

Therefore, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in the above-mentioned document cannot be considered as fulfilling the requirements of Regulation 45/2001. In consequence, 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.

On the contrary, as to the handwritten signatures, which are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

3. NO 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. However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

Consequently, I conclude that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(1)(a) and 4(1)(b) of Regulation 1049/2001 are absolute exceptions and their applicability does not need to be balanced against overriding public interest in disclosure.

The exception laid down in Article 4(3) 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 argue that 'both CETA itself as well as the process of authorisation of pesticides have seen a lot of public attention and intensive political controversy during the last few years. The assumption that mandatory regulatory cooperation with trade partners would take relevant discussions away from public fora and the people's elected representatives, was among the reasons why many people protested against CETA and other agreements alike'.

Even if members of the public have indeed expressed an interest in the subject matter covered by the document requested and have pointed to a general need for public

[14] Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

transparency related thereto, I would like to refer again to the judgment in the *Strack* case[15], where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure[16].

In your confirmatory application, you do not refer to any specific overriding public interest that would warrant public disclosure of the specific type of information included in the document in question.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the decision-making process grounded in Article 4(3), first subparagraph of Regulation 1049/2001.

It is important to highlight once again that the EU and Canada have agreed in the Rules of Procedure governing the Joint Committee and specialised committees under the Agreement to inform citizens and stakeholders on the discussions taking place in the context of the Committees via summaries of minutes and reports of the meetings (document 2) and agendas (document 1), that are publicly available on the *Europa* website[17].

5. ASPECTS FALLING OUTSIDE THE ASSESSMENT UNDER REGULATION 1049/2001

As explained in point 1 of this decision, the list of individuals present during the meeting in question is included in the opening part of document 3. Access to this document is refused, as explained in point 2 of this decision.

Nonetheless, by way of information, please note that the individuals concerned represented the following entities:

On the side of the European Commission:

- the Directorate-General for Health and Food Safety,
- the Directorate-General for Trade,
- the EU Delegation in Canada.

On the side of Member States:

- the Agriculture House, Ireland,
- the Embassy of France in the United States,

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

16 Ibid, paragraph 129.

17 See footnote 5 above.

- the Ministry of Agriculture, the Netherlands,
- the Ministry of Health, Italy.

On the side of Canada:

- the Canadian Food Inspection Agency,
- Global Affairs Canada,
- Health Canada,
- the Pest Management Regulatory Agency,
- Natural Resource Canada,
- the Mission of Canada to the EU,
- Agriculture and Agri-Food Canada.

6. 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