PAN-Europe, confirmatory application

Brussels, 14-09-2018

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To:
The Secretary-General
European Commission
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Concerning: confirmatory application.

Dear Secretary-General,
On August 27, 2018, we received the decision from DG SANTE on our request for access to documents done on July 10, 2018 (Ref GestDem No 2018/3739, attached). We do not agree with this decision and ask for your intervention.

The documents we requested from DG SANTE were requested by us before in 2016 and refused in 2017 for disclosure based on Art. 4.3 (first part), the ongoing-policy argument. Even for the documents partly disclosed in 2017 by DG SANTE, no relevant information was given and large parts censored. The August 2018 decision is more of the same unfortunately. SANTE's transparency policy is unlawful and contradicts the official rhetoric of the European institutions. We hope you will help putting SANTE's transparency policy back on track.

1. Misleading stakeholders and the public.

In its August 2018 decision SANTE suddenly moves from Art. 4.3 first part to second part as the reason for refusing to disclose documents. We feel DG SANTE has been misleading us all the time, arguing in the January 2017-decision that the problem was that the ongoing-policy on endocrine disruption prevented them from disclosing documents, while now, when all decisions have been taken, suddenly the argument is unspecified future decisions (on endocrine disruptors).
It reads in the August 2018-decision: "It would undermine the protection of future decision-making processes of the Commission on endocrine disruptors, as it would reveal views and options which might have been under consideration and which might again be discussed in the future. The Commission's services must be free to explore all possible options in preparation of a future decision free from external pressure".

This means DG SANTE has been misleadingly put forward the argument Art. 4.3, first part in previous decisions all the time. SANTE never invoked Art. 4.3 second part before for these documents. SANTE failed to mention Art. 4.3, second part in their previous decision and therefore cannot come up with this reason as a back-up now.
Since Luxembourg court will evaluate Commission's previous decision-making, we will soon know what Court thinks of misleading stakeholders and the public.

2. No evidence for the need to protect decision-making.

It is strange to note that DG SANTE 's August 2018 decision on access to documents completely disregards the verdict of the General Court , http://curia.europa.eu/juris/document/document.jsf?text=&docid=183542&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=436302 .
Commission in this verdict has been condemned for not being able to present evidence for their claimed need to keep documents (again on endocrine disruption) undisclosed. Court ruled: *It follows from the foregoing that the grounds relied on by the Commission in the contested decision are not sufficient to establish that disclosing the documents at issue would specifically and actually undermine the Commission's decision-making process, or that the risk that it would be undermined was reasonably foreseeable or even, a fortiori, that the risk was that it would be seriously undermined, as required under the case-law (see paragraphs 24 and 25 above). None of the arguments put forward by the Commission in the defence suffice to call that finding into question.*
Still in 2018 Commission manages to take the same type of decisions with the same unspecified and general grounds. This is disrespecting Court and the rule of law.

3. Exceptional cases.

Luxemburg court, in this verdict, makes it very clear that the argument of "protection of the decision-making process" and 'ongoing policy' can only be used in very exceptional cases. (Preparing for) decision-making is not an exceptional case, it is at the heart of the work of civil servants and a standard use of this argument would completely undermine transparency and the rule of law.
Using this clause for 67 documents as Commission does in its August 2018 decision, is not using them in exceptional cases but points at a standard procedure. The documents are taken as a whole and not analysed separately. Court rules in point 22 as follows*: Furthermore, the examination required for the processing of a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception. In principle, such an application can be justified only if the institution has previously determined (i) that access to the document would specifically and actually undermine the protected interest and (ii) in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, that there is no overriding public interest justifying disclosure of the document concerned. On the other hand, the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical. That examination must be apparent from the reasons for the decision (see judgment of 7 June 2011, Toland v Parliament, T-471/08, EU:T:2011:252, paragraph 29 and the case-law cited).*
None of the requirements of the four-step procedure of Court is met in SANTE's August 2018 decision.

We attach document 660 that contains 19 censored pages and that is not of any use for us and for the public in general. Regarding the documents we received 'partially' we feel DG SANTE is playing a game with us. All elements that they like to hide are censored in a completely arbitrarily and uncontrollable way. Disclosed documents are mostly "empty", just "frames" with no relevant information included. The fact that most of the content of such documents is censored confirms that access to documents applications are not processed in good faith.

4. Lack of openness and transparency.

The current SANTE August decision is extending the line of lack of openness and transparency. Only for a few documents (8) "further partially access" is granted and the rest

completely kept undisclosed (since the previous request). Even with this "further partially access" (example IASG April 2016 attached) we get page after page censored, again ensuring that we receive no relevant information and are kept at a distance. The approach taken by DG SANTE is that for a potential (unsubstantiated) risk of undermining the decision-making process, a general refusal to disclose documents is used. The arguments are lacking and we like to repeat the verdict of Court here: "*Such general, vague and imprecise statements do not prove that there is genuine external pressure on the decision-making process at issue in the present case and are not based on any concrete evidence such as to justify them".*

The decision by DG SANTE to keep the documents secret therefore is unfair, violating EU policy and false. And it is unjustified and unlawfull. It follows from settled case law that the risk of the decision-making process being undermined must be reasonably foreseeable and not purely hypothetical[1]. This is what Court rules in point 31-33: *It is to be noted in the present case that, in order to show that there was a non-hypothetical risk of external pressure and interference, the Commission merely claims in the contested decision that the subject of endocrine-disrupting chemicals is a sensitive one and has received a lot of external attention from organisations and interest representatives. Such general, vague and imprecise statements do not prove that there is genuine external pressure on the decision-making process at issue in the present case and are not based on any concrete evidence such as to justify them. Those statements are therefore not sufficiently specific and substantiated to establish the reality of external pressure and interference or, a fortiori, to establish that there would have been a reasonably foreseeable risk of the decision-making process being substantially affected if the requested documents had been disclosed.*

And, please take a look at your own officially broadcasted policy, the "transparency portal". It reads:

Transparency Portal

The European Union's activities today affect millions of European citizens' lives. The decisions affecting them must be taken as openly as possible.

As a European citizen, you have a right to know how the European institutions are preparing these decisions, who participates in preparing them, who receives funding from the EU budget, and what documents are held or produced to prepare and adopt the legal acts. You also have a right to access those documents, and make your views known, either directly, or indirectly, through intermediaries that represent you.

"You have a right to know how the European institutes are preparing these decisions....." . Can it be put more clear? How is it possible that Commission's practice is contradicting EU policy as promoted on its websites?

Qualifying 5 documents 'out of scope' on page 4 of the decision is strange and wrong, since we requested all documents indicated, not for a specific reason. Non-disclosing documents when representatives of MS are present also is unjustified. Additionally an overriding public interest is not considered at all.

[1] ECJ 17 October 2013, C-280/11, *not yet published* (*Council v Access Info Europe*), par. 31; CFI 7 February 2002, T-211/00 *ECR* 2002, p. II-485 (*Kuijer* v *Council*), par. 56; CFI 13 April 2005, T-2/03, *ECR* 2005, p. II-1121 (*Verein für Konsumenteninformation v Commission*), par. 69.

5. Conclusion

The refusal of DG SANTE is very general and in fact hypothetical. First they claimed undermining the endocrine disruption decision-making was at stake, and now it is any unspecified decision in future. Consequently, DG SANTE should specify for every single document how disclosure of the information would concretely and effectively undermine its decision-making process[2]. Since DG SANTE failed to do so, SANTE's decision cannot remain in place. No evidence is presented at all.

DG SANTE's disrespect for Court is also unacceptable. Court ruled: *……..the Commission's general claim is not substantiated by any evidence, since that institution is relying on a mere statement which is not supported by any detailed arguments. In particular, it does not contain any precise and specific information permitting the inference that, in the present case, it is reasonably foreseeable that the disclosure of the documents requested would have the effect referred to by the Commission, and so the Commission's concerns cannot be considered to be objectively justified.*

We therefore ask you to send us all full documents, with all content, no parts censored, including those denied access and those with partial access.

DG SANTE's refusal to deliver documents will force us to tell media and the public that EU Commission apparently has bad intentions towards stakeholders that represent the public. This might add to their already existing Commission's image of being deaf for the interests of the public. Our mission and role to inform and engage the public, the overriding interest that Commission keeps on disqualifying, is also to make our members and the public contributing to a common EU policy and defend EU policy. An interest that could be an advantage for Commission if they would play their role in a proper way. But we cannot do this if we keep on having the experience of not being taken serious, creating the impression of developing policy behind closed doors by an elite, keeping stakeholders others than industry at a distance, forcing us again to consult EU court.

In conclusion, DG SANTE's decision is violating the rule of law and disrespects Court verdict, by failing to put forward evidence,

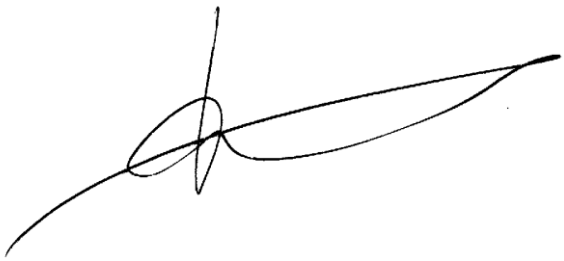
(i) that access to the document would specifically and actually undermine the protected interest and
(ii) that in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, there is no overriding public interest justifying disclosure of the document concerned.
(iii) that the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical
(iv) that there is no overriding public interest in disclosure

Commission failed to put forward evidence that they considered these four steps for every single of the 67 documents based on Art. 4.3. And misled the public by claiming the refusal to be based on Art. 4.3 first part while they now argued Art. 4.3, second part.

We hope to receive your decision soon.

[2] Commission Aarhus Implementation Report, COM(2011) 208 final, p. 13.

Sincerely yours,



Pesticide Action Network Europe
H. Muilerman.

3 attachments,

- SANTE decision August 2018
- Document 660
- Document IASG April 2016