

## **Proposal in case 860/2018/THH on the European Food Safety Authority's handling and refusal of a request for public access to declarations of interest of middle management staff**

Solution - 14/03/2019

**Case 860/2018/THH - Opened on 11/10/2018 - Decision on 18/06/2019 - Institution concerned** European Food Safety Authority ( Solution achieved ) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

### **Background to the complaint**

1. On 26 October 2017, the complainant, acting on behalf of an international network of non-governmental organisations, requested from the European Food Safety Authority (EFSA) public access to “ *the declarations of interests of EFSA's operational management* ”, stating that the link on EFSA's website “ *leads to nowhere* ”.
2. On 20 November 2017, EFSA sent to the complainant the declarations of interest of EFSA's Executive Director and four Heads of Department, which were already published on EFSA's website. EFSA had mistakenly understood that the complainant was requesting access to the declarations of interest published on EFSA's website and, as such, failed to make any reference in its decision to the declarations of interest that had not been made public on its website.
3. On 21 November 2017, the complainant responded, clarifying that the request had been for the declarations of interest of *all* EFSA operational management-level staff, including the declarations of interest that had not been published on EFSA's website.
4. After registering the complainant's clarification as a new request for public access to documents, EFSA denied access to the remaining declarations of interest (those of EFSA's middle management staff) on 15 December 2017. EFSA justified its refusal on the basis that the documents contained personal data of the individuals concerned and that the EU rules on the protection of personal data therefore applied [2] . However, since documents containing personal data may only be disclosed if legitimate necessity for disclosure has been established [3] , EFSA invited the complainant to show the necessity of disclosing the personal data.



5. The complainant took the opportunity to do so and, on 23 January 2018, set out his view of the legitimate necessity for disclosing the documents containing personal data.
6. Having extended the deadline for its response, EFSA refused public access to the declarations of interest on 9 March 2018.
7. The complainant submitted a request for a review of the refusal, a so-called “ *confirmatory application* ” [4] , on 16 March 2018.
8. On 11 April 2018, EFSA confirmed its initial decision, refusing access.
9. Dissatisfied with this outcome, the complainant turned to the Ombudsman on 9 May 2018.

## The inquiry

10. The Ombudsman opened an inquiry into EFSA's handling and refusal of a request for public access to declarations of interest of middle management staff.
11. In the course of the inquiry, the Ombudsman received EFSA's additional views on the complaint and inspected the requested documents.

## Arguments presented to the Ombudsman

### EFSA's arguments

12. EFSA stressed the distinction between scientific experts and members of EFSA's Scientific Committee and Scientific Panels on the one hand, and staff working in EFSA on the other hand. The rules establishing EFSA and laying down procedures in matters of food safety [5] require public disclosure of the declarations of interest of EFSA's Executive Director, members of its Management Board, members of the Advisory Forum, members of EFSA's Scientific Committee and members of EFSA's Scientific Panels. Therefore EFSA noted that it publishes on its website all those declarations of interests in relation to which public disclosure is mandatory. It also publishes those of Heads of Departments, although this was not mandatory at the time of the complainant's request.
13. EFSA argued that the rules which apply to non-scientific staff members of EFSA are the EU Staff Regulations [6] , which do not require the disclosure of declarations of interest. EFSA considered the complainant's request under Regulation 1049/2001. In EFSA's view, the complainant had not put forward any valid argument establishing the necessity of having the personal data transferred to him, as required under Regulation 1049/2001 for compliance with EU data protection rules.



**14.** In the course of the inquiry, EFSA informed the Ombudsman that from July 2018 it required the publication of the declarations of interest of the members of EFSA's operational management team. [7] This covers not only EFSA's Executive Director, but also the Heads of Department and Heads of Unit. [8] EFSA stressed that the declarations of interest of the Executive Director and Heads of Department are already publicly available and that the publication of the declarations of interest of the Heads of Unit was envisaged for the first quarter of 2019.

**15.** EFSA noted that, as an EU agency, it is subject to "*scrutiny by the authorities and bodies with a mandate for audit and control*", which ensures that the declared interests of its staff are compatible with EFSA's work. Its policy stipulates that its staff must submit annual declarations of interest. This ensures the systematic screening of staff interests for potential conflicts. [9] EFSA disagreed with the complainant's argument that the scientific quality of its work cannot be scrutinised by the public if the requested documents are not disclosed. In its view, the declarations of interest are a "*tool of ensuring EFSA's independence and not a tool to identify scientific excellence*". The scientific excellence of its staff is assessed in the recruitment procedures and through the award of certificates, degrees and prizes. EFSA also said that the fact that some staff have been employed previously in "*industry*" or in corporate finance bodies does not mean that they cannot be recruited by EFSA. The declarations of interest prevents the recruitment of individuals who have conflicts of interest in relation to the tasks for which they are recruited.

**16.** Regarding the handling of the request, EFSA considered this to be in line with EU rules. [10] EFSA explained that initial requests and confirmatory applications had previously been received in the same mailbox. However, while initial requests are handled by the Head of the Legal and Assurance Services in collaboration with the relevant Units, confirmatory applications are handled by EFSA's Executive Director. EFSA explained that, with its new policy on the management of access to documents requests, confirmatory applications would in future be sent directly to EFSA's Executive Director.

**17.** In EFSA's view, it had not failed to address all the documents requested by the complainant in his initial request. EFSA was of the view that its response was sufficient, since EFSA had referred to all declarations of interest that were available on EFSA's website. Following the complainant's letter in which he clarified that he was requesting access to the declarations of interest of all members of EFSA's operational management, EFSA considered the complainant's clarification as a new request for access to documents and gave it a new reference number.

**18.** Finally, EFSA stressed that it had invited the complainant to put forward arguments demonstrating the necessity for the transfer of the personal data in accordance with Article 8(b) of Regulation 45/2001. Following the complainant's response, EFSA stated that it had made an assessment of the complainant's arguments and provided a sufficient explanation for the refusal of the requested documents.



## The Complainant's arguments

**19.** The complainant argued that it is not in accordance with EFSA's policy, nor with the rules establishing EFSA and laying down procedures in matters of food safety [11], for EFSA *not* to disclose the declarations of interest of *all* operational management staff.

**20.** According to the complainant, EFSA had a bad reputation on transparency and conflicts of interest and that renders it “*necessary*” in accordance with the EU rules on data protection [12] to disclose the personal data, as this disclosure is required for the purposes of public scrutiny. The complainant argued that public access will enable stakeholders and the public to form their own view of the documents. Such transparency would help to promote democracy, prevent conflicts of interest and biased decisions, and establish trust in EFSA.

**21.** The complainant raised the question as to why the remainder of the staff declarations of interest could not be made public if such declarations of the Heads of the Department were, especially considering that there is no legal distinction between senior and non-senior staff.

**22.** Additionally, the complainant criticised EFSA's handling of the access to documents requests. In his view, the fact that confirmatory applications have to be sent to the same person within EFSA as the original application renders the review procedure futile since the outcome can be predicted. He argued that this means the confirmatory application cannot serve as a proper review of the initial decision. That puts the complainant at a disadvantage by “*missing*” an opportunity in the legal procedure for the institution to re-consider its decision.

**23.** The complainant also argued that EFSA initially failed to take a decision on his whole request, by granting access to the documents that were published on the website, but not deciding on the documents that were not. Only after the complainant's clarification that he requested twenty-nine documents, instead of five, did EFSA decide on the other twenty-four.

**24.** In addition, the complainant claimed that EFSA's replies were “*general and not really to the point*”. The complainant noted that, in the course of assessing the request, EFSA requested that he justify the legitimate necessity for disclosure of the personal data contained within the documents. However, according to the complainant, following his clarification, EFSA failed to address and consider his arguments.

## The Ombudsman's assessment

**25.** The Ombudsman accepts the validity of EFSA's argument concerning the distinction between scientific experts and members of EFSA's Scientific Committee and Scientific Panels on the one hand, and of mid-level staff working in EFSA on the other. The Ombudsman is satisfied that EFSA has published the relevant declarations of interest in accordance with the rules establishing EFSA and laying down procedures in matters of food safety. [13]

**26.** The Ombudsman welcomes the fact that EFSA has gone a step further in disclosing the



declarations of interest of Heads of Department, which disclosure was not mandatory at the time of the complainant's request for access to the documents. The Ombudsman acknowledges that the EU Staff Regulations do not include an obligation for the disclosure of declarations of interest by EFSA's middle management staff. [14]

**27.** The Ombudsman also welcomes the recent implementation of EFSA's decision to disclose on its website the declarations of interest of Heads of Unit. This marks an important step in achieving greater transparency.

**28.** The Ombudsman notes that EFSA's Decision stipulates that the composition of EFSA's operational management team will be indicated on EFSA's website. [15] In its additional views, EFSA explained that the operational management team is composed of the Executive Director, the Heads of Department and the Heads of Unit. This is consistent with the statement on EFSA's website which reads: "*The day-to-day management of EFSA is the responsibility of the Executive Director with the support of Heads of department and Heads of unit*".

**29.** However, when the complainant requested access to all twenty-nine declarations of interest of the members of EFSA's operational management team, he understood the operational management team to include the Chief Scientist, the Senior Science Coordinator, the Senior Policy Adviser, the Team Leader and the Stakeholder Engagement Officer.

**30.** As regards EFSA's Chief Scientist, Senior Science Coordinator and Senior Policy Adviser, it can be concluded from EFSA's organisational chart [16] that these individuals act as advisers and provide direct support to the Executive Director. As such, they would each appear to have very influential roles concerning the setting of EFSA's policies and strategies on science. Therefore, the Ombudsman considers that it would be appropriate and consistent for EFSA to publish the declarations of interest of these individuals in the same way as it does those of the Heads of Department and Heads of Unit.

**31.** As regards the remaining declarations of interest requested by the complainant, specifically those of the Team Leader and Stakeholder Engagement Officer, the Ombudsman is satisfied that the individuals in these roles are neither members of EFSA's operational management team nor do they provide direct support to the Executive Director. As such these individuals do not have a significant role in the adoption of EFSA's substantive policies concerning food and feed safety. In this context, there is no obvious necessity for granting public access to their personal information and, in any event, none has been demonstrated to EFSA.

**32.** Concerning EFSA's handling of access to documents requests, the Ombudsman welcomes EFSA's explanation that initial and confirmatory applications are handled by different staff. The Ombudsman is satisfied that EFSA has an appropriate system in place for processing requests for access to documents.

**33.** The Ombudsman also notes that EFSA's new Standard Operating Procedure will establish separate mailboxes for initial and confirmatory applications. The Ombudsman considers that this new procedure will provide welcome reassurance to applicants that confirmatory



applications will be assessed objectively and afresh.

**34.** Whilst welcoming the explanation that has been provided to her concerning the handling of access requests and the establishment of separate mailboxes, the Ombudsman is conscious that EFSA clarified these matters in its additional views provided to her, which the complainant did not receive. The Ombudsman therefore suggests that EFSA should provide this information to the complainant. The Ombudsman will then consider this issue settled.

## **The proposal for a solution**

**Based on the above assessment, the Ombudsman proposes that the European Food Safety Authority should publish the declarations of interest of the Chief Scientist, Senior Science Coordinator and Senior Policy Adviser.**

## **Suggestions for improvement**

**The Ombudsman suggests that the European Food Safety Authority should provide more information to the complainant concerning the systems it has or will put in place for the handling of initial and confirmatory applications under Regulation 1049/2001.**

The European Food Safety Authority is invited to inform the Ombudsman by 15 April 2019 of any action it has taken in relation to the above solution proposal and suggestion for improvement.

Emily O'Reilly

European Ombudsman

Strasbourg, 14/03/2019

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] In accordance with Regulation 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, available at



<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:008:0001:0022:en:PDF> [Link] and in accordance with Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1> [Link].

[3] Article 8(b) of Regulation 45/2001.

[4] In accordance with Article 8 of Regulation 1049/2001.

[5] Articles 37 and 38 of Regulation 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food

Safety Authority and laying down procedures in matters of food safety, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0178&from=EN> [Link].

[6] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20140501&from=EN> [Link].

[7] Decision of the Executive Director of the European Food Safety Authority on Competing Interest Management, available at [https://www.efsa.europa.eu/sites/default/files/corporate\\_publications/files/competing\\_interest\\_management\\_17.pdf](https://www.efsa.europa.eu/sites/default/files/corporate_publications/files/competing_interest_management_17.pdf) [Link]

[8] Article 24(1)(a)(iv) of the Decision of the Executive Director of the European Food Safety Authority on Competing Interest Management.

[9] Article 37 of Regulation 178/2002; Regulation No 31 (EEC) and 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, 14 June 1962; European Food Safety Authority, Decision of the Executive Director on Declarations of Interests, 31 July 2014, available at: [https://www.efsa.europa.eu/sites/default/files/corporate\\_publications/files/independencerules2014.pdf](https://www.efsa.europa.eu/sites/default/files/corporate_publications/files/independencerules2014.pdf) [Link].

[10] Regulation 1049/2001.

[11] Article 37 of Regulation 178/2002.

[12] Article 8(b) of Regulation 45/2001.



[13] Article 37 of Regulation 178/2002.

[14] Regulation 31 (EEC) and 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, 14 June 1962.

[15] Article 24(1)(a)(iv) of the Decision of the Executive Director of the European Food Safety Authority on Competing Interest Management.

[16] Available at <http://www.efsa.europa.eu/sites/default/files/assets/orgchart.pdf> [Link]