



EXECUTIVE DIRECTOR

Detailed Opinion of the European Food Safety Authority (hereinafter EFSA) to the recommendation from the European Ombudsman to EFSA of 2 May 2022 in case 2124/2021/MIG

I. BACKGROUND

On 23 February 2021, the complainant, a civil society organisation representing the interests of hunters submitted a request to EFSA for public access to the documents provided *"to ECHA on 10.06.2020 with respect to the concentration of lead in game meat and the consumption frequency of game meat in the EU"*.

On the same day, EFSA acknowledged receipt of the complainant's request. The five documents falling within the scope of the request were identified by EFSA, as one email to ECHA and four attachments to that email.

In line with its established practice EFSA intended to assess and – to the extent possible – disclose all requested documents. Taking into consideration the intense workload experienced in the public access to documents domain, EFSA split the request into multiple batches and processed them consecutively extending the deadline to respond by means of a 'fair solution' under Article 6(3) of Regulation 1049/2001.

Following the extensions, on 3 May 2021, EFSA gave the complainant access to a first batch of documents, containing parts of the email and of one attachment.

On 28 May 2021, EFSA gave the complainant access to a second batch of documents.

In disclosing the first and second batch of documents, EFSA informed the complainant of its right to make a confirmatory application.

Concerning the third and final batch containing the remaining document, EFSA extended by means of fair solution letters the deadline to reply, keeping the complainant frequently informed, at approximately a monthly interval.

On 21 September 2021, the complainant requested a review of EFSA's implied refusal to give access to the remaining document (by making a 'confirmatory application').

On 28 September 2021, EFSA acknowledged receipt of the complainant's confirmatory application. On 13 October 2021, EFSA granted the complainant access to large parts of the last document. Concerning the delay incurred, EFSA apologised and said that it *"had to liaise internally with several EFSA [departments] and launch consultations with numerous data providers in order to finalise the assessment (...) which unfortunately was time-consuming"*.

Dissatisfied, the complainant turned to the European Ombudsman in December 2021.

II. THE COMPLAINT AND THE EUROPEAN OMBUDSMAN ASSESSMENT

The complainant challenged the delay in processing the PAD application claiming infringement of Regulation 1049/2001 and the principles of good administration. Specifically, the complainant considered that EFSA's approach misused the Article 6(3) of Regulation 1049/2001 fair solution provision, because the complainant considered that the request did not relate to a 'very large number of documents'. Furthermore, the complainant reported that the use of fair solutions resulted in subsequent extensions of the deadline to process its PAD application, without involving the requester at an early stage with a view to clarifying the scope of the request. The complainant submitted that an earlier involvement of the requester with a view to the clarification of the scope would have allowed for a prioritisation of the documents of greater interest to him, thus enabling the requester to benefit from the information contained within the relevant documents in the context of participating in a relevant public consultation with a specific deadline.

The European Ombudsman registered the case and organised a meeting to collect all the elements related to EFSA's position on the specific procedure. The outcome of the meeting was documented in a report of the case of 9 March 2022 and on 2 May 2022 the European Ombudsman issued two recommendations communicated to EFSA. In the letter addressed to EFSA, the European Ombudsman upheld the main arguments of the complainant.

In particular, the Ombudsman reminded EFSA about the time limits set in Article 7(3) of Regulation 1049/2001, according to which 'In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given'.

The European Ombudsman indicated that *when an institution finds itself unable to process a particular request for public access within the prescribed deadline, due to the disproportionate administrative burden that this would entail, Regulation 1049/2001 provides for the possibility to agree on a 'fair solution' with the applicant. the EO pointed out that such a solution may, for example, entail reducing the number of documents covered by the request*'.

With regards to the specific case, while acknowledging EFSA arguments about the constant increasing workload experienced in the recent years in the public access domain and its continuous efforts to maximise transparency targeting the entire scope of the PAD applications received, the European Ombudsman concluded on the maladministration in the concrete case. In this respect, the European Ombudsman concluded on the untimely processing of the mandatory third-party consultations to be carried out in accordance with Article 4(4) of Regulation 1049/2001, which cannot in itself justify any delay in the processing of a PAD application and criticised the fact that no list of documents allowing for the clarification of the scope of the PAD application was shared with the complainant. Additionally the European Ombudsman also criticised the fact that the decision to process the request in subsequent batches was not shared with the requester upon receipt as well as a lack of clear communications with the requester with regard to the schedule of the processing of his request. Finally the European Ombudsman criticised the repetitive extensions of the deadlines by means of fair solutions letters.

In this regard, the European Ombudsman underlined that she *has consistently taken the position that access delayed is access denied and that while the time limits set out in Regulation 1049/2001 may at times appear ambitious, it is of utmost importance that the EU administration ensures it deals with requests for public access in a timely manner*.

The Ombudsman therefore issued two recommendations aimed at improving EFSA's practice in dealing with access to document requests with respect to fair solutions processing.

III. THE EUROPEAN OMBUDSMAN'S RECOMMENDATIONS

On 2 May 2022, the European Ombudsman made the following two recommendations to EFSA: "When proposing a 'fair solution' (under Article 6(3) of Regulation 1049/2001) for dealing with public access requests, EFSA should cease its practice, reflected in its implementing rules [16], of extending the prescribed time limits beyond 30 working days.

If EFSA considers that a public access request is formulated in broad terms, it should provide applicants with a list of the specific documents it identifies at an early stage, to enable the applicants to clarify their request, if necessary".

IV. EFSA'S REPLY TO THE RECOMMENDATIONS OF THE EUROPEAN OMBUDSMAN

EFSA acknowledges the recommendations of the European Ombudsman resulting from the inquiry into the complaint received and treats with the utmost seriousness the findings of the European Ombudsman as well as suggested measures to be put in place with a view to ensuring that the Authority deals with requests for public access to documents in a timely manner.

EFSA embraces transparency with the highest level of commitment, and this has been further enhanced through EFSA's implementation of Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain (hereinafter "the Transparency Regulation"). In addition, it is appropriate to emphasise that openness represents one of the Authority's key values which guide all EFSA activities, as explicitly confirmed in the mission and values section of EFSA's website.

EFSA's endeavours in both the disclosure resulting from responses to PAD applications and in the proactive publication to enhance transparency in all its operations. This proactive and reactive transparency has resulted in an ever-increasing dissemination of information to stakeholders and the public in general, which is best demonstrated by the statistical evidence available, particularly in the context of the processing of public access to documents requests. For example, it should be highlighted that EFSA processed an increasing number of PAD applications over the recent years which resulted in a considerably high number of documents disclosed in the processing.

In addition to demonstrating a remarkably high level of transparency in general, these figures also allow a number of other considerations to be made. For example, the low number of confirmatory applications received and the high number of frequent requesters indicates that a good level of satisfaction and trust has been generated as a direct result of EFSA's processing of public access to documents throughout a long period of time. Besides this, a discernible increase in the quantity and complexity of applications for public access to documents submitted to EFSA can be observed, which results in higher demands and more time being needed to satisfy the specific interests of individuals requesting access to documents held by EFSA. Moreover, the kinds of requests which EFSA receives are becoming increasingly complex in nature as requesters gain greater familiarity with EFSA's activities through the Authority's substantial transparency commitments and stakeholder engagement efforts. It should be noted that, where necessary, in order to satisfy the interests of the public access to documents requesters sufficient time is needed to provide a comprehensive reply on all substantive issues and to conclude the accessibility assessment on all documents in relation to which applicants have a specific interest. This has been implemented over recent years, allowing EFSA to satisfy the full scope of all requests received thus addressing in a comprehensive manner the transparency needs of stakeholders and the general public as a whole.

It should be noted that EFSA's implementation of the Transparency Regulation has further enhanced the visibility of the Authority's activities and EFSA has recently introduced a specialised digital platform by means of which applications for public access to documents can be submitted in addition to the more traditional manner of e-mailing a dedicated functional mailbox, which is also still possible. It should also be noted that this specialised digital platform has been used to generate efficiency gains by way of a certain level of automation in the processing of public access to documents requests. EFSA will also begin to make use of another IT tool to produce in-depth statistics and employ statistical analysis of data collected over the years in order to support the calculation of the assessment and preparation of the documents which can be carried out in the time available pursuant to the applicable legal deadline. This calculation takes into consideration a number of variables such as for example the material scope of the request, the nature, quantity and volume of the document requested, the extent of the consultation process required. We would also like to highlight that in 2021 and in 2022 significant further resources in addition to investment in digitalisation have also been allocated to EFSA core transparency related activities.

In light of the above, while we consider that EFSA's processing of public access to documents requests has offered stakeholders and the public a high level of transparency over a sustained period of time, we would also like to clarify that EFSA aims to take on board the recommendations of the European Ombudsman to further enhance the legal certainty linked to the adherence to the time limits foreseen in the Regulation. In particular, in the event of an application relating to a very long document or to a very large number of documents that cannot be addressed within the mandatory time limits foreseen in the Regulation (EC) No 1049/2001, the Authority will aim to promptly prepare a list of documents falling within the scope of the specific request received and will seek to reach a fair solution with requesters regarding the material scope of the request. This list of documents will be swiftly shared with the relevant public access to documents applicant in order to clarify which are the priority documents from the perspective of the individual requester. EFSA will also use new technology in order to support the predictions regarding the documents which can be provided within the specific timelines foreseen in Regulation (EC) No 1049/2001.

Taking stock from the robust experience in processing PAD applications and considering that they generally relate to a large number of documents, the reply which can be given within the mandatory deadline is not usually sufficient to satisfy the interest behind the submission of the PAD applications which EFSA receives. Consequently, EFSA's strive for greater transparency in the processing of PAD applications will be ensured by conferring with the PAD applicants, inviting them to submit additional PAD applications if their interest is not limited to documents for which a response can be obtained in full within the legally prescribed timeframe.

In addition, EFSA commits to proactively update the Decision of the Management Board laying down practical arrangements for implementing Regulation (EC) No 1049/2001 and Articles 6 and 7 of Regulation (EC) No 1367/2006.

Furthermore, EFSA plans to shortly issue and publish a guidance document to applicants for public access to documents where PAD applicants are guided through the process and where EFSA will also clarify this aspect of the process. Moreover, EFSA will organise a specific webinar with a view to offering further support to stakeholders and the public with the launch of the specific guidance.

EFSA hopes that with the concrete implementation described in this detailed opinion the recommendations of the European Ombudsman will be satisfied in full whilst simultaneously maintaining the highest level of transparency offered to stakeholders and the public over the years.

Bernhard Url