

**DECISION OF THE CHAIRMAN OF THE BOARD OF APPEAL  
OF THE EUROPEAN CHEMICALS AGENCY**

**27 October 2011**

**Request for confidential treatment of certain information**

*(Protection of personal data – Regulation (EC) No 45/2001)*

<b>Case number</b>	A-005-2011
<b>Language of the case</b>	English
<b>Appellant</b>	Honeywell Belgium N.V. Belgium
<b>Representative</b>	Messrs. Herbert Estreicher and Marcus Navin-Jones Keller and Heckman LLP Avenue Louise 523 B-1050 Brussels Belgium
<b>Contested decision</b>	CCH-D-0000001396-72-03/F of 22 March 2011 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 41 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006, p.1; corrected by OJ L 136, 29.5.2007, p. 3; hereinafter the 'REACH Regulation')

**THE CHAIRMAN OF THE BOARD OF APPEAL**

gives the following

## Decision

### SUMMARY OF THE FACTS

1. On 21 June 2011, the Appellant filed an appeal with the Registry of the Board of Appeal of the European Chemicals Agency (hereinafter the 'Registry') against the contested decision.
2. On 22 September 2011, the Agency lodged the defence with the Registry of the Board of Appeal.
3. Pursuant to Article 7(2)(d) of Commission Regulation (EC) No 771/2001 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ L 206, 2.8.2008, p. 5; hereinafter the 'Rules of Procedure'), the Agency requested confidential treatment for certain information contained in the annexes attached to the defence. More specifically, the Agency's request concerned the identities of certain individuals who gave expert statements in support of the Agency's defence and the identity of one member of the Agency's staff mentioned in one of those statements.
4. On 23 September 2011, the Chairman of the Board of Appeal (hereinafter the 'Chairman') requested the Agency to clarify the personal scope of its request for confidential treatment, in particular whether the request applied also with respect to the Appellant.
5. By a reply dated 27 September 2011, the Agency informed the Registry that its request for confidential treatment applied to third parties, and not to the Appellant.

### GROUNDS OF THE REQUEST

6. The Agency bases its request for confidential treatment on Regulation (EC) No 45/2001 of the European Parliament and of the Council 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 (OJ L 8, 12.1.2001, p.1; hereinafter 'Regulation (EC) No 45/2001').
7. The Agency argues that the identities of the experts and the Agency's staff member, mentioned in Annexes 9 and 10 to the Agency's defence, constitute personal data within the meaning of Article 2(a) of Regulation (EC) No 45/2001. The Agency further claims that the criteria for the lawful processing of personal data, as laid down in Article 5 of Regulation (EC) No 45/2001, are not met in this present case.

### REASONS

8. Article 7(2)(d) of the Rules of Procedure provides that the Agency may request information submitted to the Board of Appeal as part of the defence to be treated as confidential.
9. By way of a preliminary remark, it should be noted that since the Rules of Procedure are silent on who should decide on a confidentiality request when it is submitted by the Agency, the present confidentiality request should be decided by analogy with the second subparagraph of Article 6(6) of the Rules of Procedure, which provides that the Chairman shall decide whether

information indicated as confidential by an appellant in a notice of appeal should be regarded as such.

10. By way of a further preliminary observation, the Chairman notes that the Agency requests that confidential treatment be accorded vis-à-vis third parties. In accordance with Article 6(6) and Article 21(5) of the Rules of Procedure, information on an appeal shall be made public, and thus disclosed to third parties, in the appeal announcement and the final decision of the Board of Appeal. As the appeal announcement in the present case has already been published, the Agency's request for confidential treatment is taken to relate to the final decision of the Board of Appeal. Accordingly, the Chairman's decision on the Agency's request applies to the any final decision that the Board of Appeal adopts in the present case.
11. In light of the above considerations, the issue to be decided in the present case is whether the identities of certain experts and a member of the Agency's staff contained in Annexes 9 and 10 to the defence should be kept confidential vis-à-vis third parties in the final decision of the Board of Appeal, as requested by the Agency.
12. The Agency has based its request for confidential treatment on Regulation (EC) No 45/2001. It is therefore necessary to examine whether Regulation (EC) No 45/2001 is applicable in the present case.

*Relevant provisions of Regulation (EC) No 45/2001*

13. Article 2(a) of Regulation (EC) No 45/2001 defines '*personal data*' 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. Personal data includes also surnames and forenames (see to that effect Case C-28/08 P, judgment of 29 June 2010, *Commission v The Bavarian Lager Co. Ltd*, [2010], not yet reported, paragraph 68).
14. In accordance with Article 2(b) of Regulation (EC) No 45/2001, '*processing of personal data*' means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction. '*Processing*' also encompasses the communication of surnames and forenames (see to that effect, Case C-28/08 P, judgment of 29 June 2010, *Commission v The Bavarian Lager Co. Ltd*, [2010], not yet reported, paragraph 69).
15. Article 5 of Regulation (EC) No 45/2001 defines the circumstances in which personal data may be lawfully processed. This includes, pursuant to Article 5(a) of Regulation (EC) No 45/2001, circumstances where processing is necessary for the performance of a task, which is carried out in the public interest further to the EU Treaties or other legal instruments adopted on the basis thereof, or where it is in the legitimate exercise of official authority vested in the EU institution or body or in a third party to whom the data are disclosed.

16. Article 7(1) of Regulation (EC) No 45/2001 provides that personal data shall only be transferred within, or to, other EU institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient. 'Recipient' is defined in Article 2(g) of Regulation (EC) No 45/2001 as any natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not.
17. Finally, Article 8(b) of Regulation (EC) No 45/2001 imposes limits on the transfer of personal data to recipients outside the EU institutions and bodies. More specifically, personal data can only be transferred to recipients other than the EU institutions and bodies where the recipient establishes the necessity to have the data transferred and there is no reason to assume that the data subject's legitimate interests might be prejudiced.

*Application of Regulation (EC) No 45/2001 in the present case*

18. In the present case, Annexes 9 and 10 to the defence, to which the Agency's request relates, contain two expert statements made in support of the Agency's defence. The Chairman observes that these statements disclose, insofar as the experts are concerned, their names and contact details as well as the names of the companies they represent. Furthermore, Annex 10 discloses the name of a member of the Agency's staff who was in contact with one of the experts. Thus, the statements identify the forenames and surnames of the individuals concerned.
19. It follows that Annexes 9 and 10 to the defence contain personal data within the meaning of Article 2(a) of Regulation (EC) No 45/2001. As regards the applicability of Regulation (EC) No 45/2001, the Chairman does not consider it appropriate to distinguish between the experts that made statements in support of the Agency's defence and the member of the Agency's staff. In accordance with Recital 7 to Regulation (EC) No 45/2001, the provisions on the protection of personal data apply also to persons who are employed by the EU institutions or bodies. Conversely, for the purposes of appraising the legitimacy of any transfer of personal data, it may be necessary to distinguish between experts that may be called upon to give evidence as witnesses or experts before the Board of Appeal, and members of the Agency's staff who are mentioned in procedural documents only incidentally and in their administrative capacity.
20. As regards the processing of personal data, the Chairman clarifies that any personal data submitted to the Board of Appeal in the context of specific appeal proceedings is, by the very act of its submission, processed within the meaning of Article 2(b) of Regulation (EC) No 45/2001. However, such processing by the Board of Appeal, including its Registry, in the context of specific appeal proceedings satisfies the criteria for lawful processing, as laid down in Article 5(a) of Regulation (EC) No 45/2001. Accordingly, the Agency's statement regarding the lawfulness of the processing of personal data in this particular case is not a pertinent argument for requesting confidential treatment.
21. It follows that the Agency's request not to disclose the personal data to third parties must be assessed in light of Article 8 of Regulation (EC) No 45/2001, which regulates the transfer of personal data to recipients other than the EU institutions and bodies. In this respect, the Chairman observes that the requirement of necessity, as laid down in Article 8(b) of Regulation (EC) No

45/2001, is not satisfied in the present case. In particular, for the purposes of the final decision in the present case, it is not necessary to include the identities of either the experts that provided statements in support of the Agency's defence or of the member of the Agency's staff.

22. For the above reasons, the Chairman accepts the Agency's request to keep confidential in the final decision the identities of the experts and of the member of the Agency's staff mentioned in the statements that were attached as Annexes 9 and 10 to the Agency's defence.
23. The Chairman observes that this finding is also consistent with the Chairman's decision of 29 July 2011 on the Appellant's request for confidential treatment. By that decision, the Chairman accepted not to disclose in the appeal announcement and the final decision the identities of certain individuals mentioned in the Appellant's notice of appeal.
24. By way of a further remark, the Chairman observes that personal data pertaining to the members of the Agency's staff, when only incidental to the specific appeal proceedings and mentioned only in an administrative capacity, is not generally necessary for the legitimate performance of the tasks of the Board of Appeal, including its Registry. Such information would not generally need to be disclosed to third parties in any appeal announcement or the final decision that the Board of Appeal may take in an individual appeal case. In this respect the Regulation (EC) No 45/2001 is clear, in its Recital 7, that '*the persons to be protected are those whose data are processed by [EU] institutions or bodies in any contexts whatsoever, for example because they are employed by these institutions or bodies*'. Accordingly, the Agency should assess in each case whether transfer of the names and positions held by its staff members would be necessary in light of Regulation (EC) No 45/2001, having regard in particular to Article 7(1) thereof.
25. Finally, the Chairman wishes to add that should the Board of Appeal accept any of the applications to intervene which have been submitted in the present proceedings, the identity of the Agency's staff member, whom acted in an administrative capacity and was mentioned only incidentally in documents submitted by the Agency, appears to be of no relevance for the purposes of the present proceedings. Consequently, in accordance with Article 8(b) of Regulation (EC) No 45/2001, the identity of the Agency's staff member will not be disclosed to the intervening parties should the Board of Appeal accept any of the applications to intervene. The Chairman clarifies that as regards the identities of the experts that gave statements in support of the Agency's defence, the need for confidential treatment vis-à-vis the intervening parties may need to be re-examined in the decision of the Board of Appeal on the applications to intervene.

**ORDER**

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

Decides to accept the Agency's request to keep confidential the identities of certain individuals who gave expert statements in support of the Agency's defence and the identity of the members of the Agency's staff mentioned in documents attached as Annexes 9 and 10 to the Agency's defence.

Mercedes ORTUÑO  
Chairman of the Board of Appeal