



European Commission
Secretary General
Transparency Unit SG B 4
sg-acc-doc@ec.europa.eu

On behalf of Justice and Environment, European Network of Environmental Law Organizations, I as the Chairman of the organization submit the below

CONFIRMATORY APPLICATION

to the Secretary General of the European Commission against the refusal by the Commission of our request for access to documents dated 19 August 2015 and delivered on the same day. The reference number of the case is Ref GestDem No. 2015/4284.

We kindly request the European Commission to review its position regarding the refusal of access to documents in the said case. Our arguments in favor of disclosure of the requested documents are specified and reasoned below.

I.

Being fully aware of the present case law of the Court of Justice of the European Union (CJEU) interpreting access to documents on infringement procedures, we are convinced that the requested documents should be disclosed because of **the overriding public interest that outweighs the supposed need for confidentiality** of the infringement procedure and that must be considered by the Commission when deciding about the access to information (CJEU Case T-29/08).

I.I

The overriding public interest in disclosure is grounded in the fact that this case gravely affects at least millions of people. In the Czech Republic, excessive air pollution in specific areas is one of the most serious environmental problems.

The official Report on the Environment of the Czech Republic states that in 2012 the limit value for twenty-four hour average concentration of PM10 (dust) has been exceeded on 9,6 % of the territory of Czech Republic and 30,9 % of the population, which means around 3,25 million people has been exposed to excessive concentrations of dust. Similarly, according to the Czech Hydro-meteorological Institute's 2014 annual report, the limit value for twenty-four hour average concentration of PM10 has been exceeded more times than allowed by the legislation on almost half of the monitoring centers situated across the whole Czech Republic.¹

¹ http://www.chmi.cz/files/portal/docs/uoco/mes_zpravy/Rocni_zprava_2014.pdf

The most extensive air pollution is particularly in Moravskoslezský region (1,2 million inhabitants) and Ústecký region (800 thousand inhabitants).² For example in the city of Ústí nad Labem, the last year's total number of days on which limits of particulate matter can be exceeded (35 days) was exhausted already in mid-March. In Moravskoslezský region it was even earlier, namely in Věřňovice, at the end of February.

In Radvanice and Bartovice, parts of the capital of Moravskoslezský region Ostrava, average concentration values of PM10 permanently exceed the legal limit (which is 40 µg/m³ as annual average limit value) and reached 43,7 µg/m³ in 2013 and 42,6 µg/m³ in 2014 on average.³

Also daily concentration of PM10 continuously exceeds daily limit values 3 to 4 times in Radvanice and Bartovice. Whereas the legislation allows 35 days on which limits of particulate matter can be exceeded during a year (as already mentioned above), limits were exceeded 116 times in 2012, 129 times in 2013 and 97 times in 2014⁴.

The problem of air pollution (especially concerning PM10) is long-term and very serious, reportedly resulting in vast number of cases of asthma, cardiovascular problems, lung cancer and premature death. This outstanding issue of the excessive air pollution in the most affected regions is unbearable and demands immediate solution and all data are highly important in this respect.

From this point of view we consider our request in the respective case as **pressing and capable of prevailing over the reasons justifying the refusal to disclose the documents, as presumed by the CJEU.**

I.II

Justice and Environment as a network of 12 green law NGOs located in several EU countries aims for a stronger environmental legislation and implementation on both the national and European Union stages to protect the environment, people and nature. Climate and pollution control are the topics that are part of our long-term missions.

Air pollution is also one of the most important topics dealt with by our member organisation Frank Bold which is based in the Czech Republic and Poland⁵. Since 2009/2010, Frank Bold provided legal as well as advocacy support for local initiatives in the Ostrava region affected by the air pollution ("Air", Vzduch from Bartovice, Radvanice, in last years also to "Clean Air", Čisté nebe from Ostrava, <http://www.cistenebe.cz/>).

Frank Bold focuses on the air pollution in the Czech Republic also on the systemic level. This for example covers the long term involvement in communication with the relevant stakeholders from local, regional and national level focused on Regional Air Quality Management Plans (Programmes pursuant Article 23 of the Directive) which are being prepared by the Ministry of Environment. Frank Bold also represented local citizens of Ostrava in a legal case where national courts in 2015 finally confirmed that the Czech Republic acted *contra legem* by not taking any effective measures and remedies to meet the air pollution limits in the city of Ostrava so far.

² Report on the Environment of the Czech Republic 2012, Ministry of the Environment, available online: http://www1.cenia.cz/www/sites/default/files/Zpr%C3%A1va%20o%20C5%BEivotn%C3%ADm%20prost%C5%99ed%C3%AD%20C4%8Cesk%C3%A9%20republiky%202012_20131023.pdf. Report from 2011 available also in English: http://www1.cenia.cz/www/sites/default/files/Report_on_the_Environment_of_the_Czech_Republic_2011_pro%20web%20a%20USB.pdf. For maps of exceedances see p.32 and beyond.

³ http://portal.chmi.cz/files/portal/docs/uoco/isko/tab_roc/2013_enh/pollution_hdqy/CZTOS_PM10_CZ.html

⁴ http://portal.chmi.cz/files/portal/docs/uoco/isko/tab_roc/tab_roc_CZ.html

⁵ <http://en.frankbold.org/our-work/programme/clean-local-energy>

The important aspect of the above outlined work is an ongoing support for affected people living in the regions which are of the most polluted in the EU. The basis for all these activities (aiming to meeting the limit values, ensuring access to justice for the local people and availability of the credible data on the air pollution and its impact on health and environment, related awareness raising actions) stems from the obligations of the Czech Republic under the EU Directive and the breach with these obligations.

The requested information is thus of high importance for us as one of our member organisations could directly use it (as described below) for the public interest in order to promote the protection of health of citizens and of the environment in the Czech Republic by effectively enforcing the improvements of the air quality standards.

The air pollution is a cross-cutting issue which shall be by its nature regulated by public authorities. However, the state policies implemented so far in the Czech Republic have not brought substantial change in terms of limiting the air pollution to the levels which would be necessary for the protection of public health and the environment.

In this situation, the public concerned should have access to the information relating to the alleged infringement of the EU law by the Czech Republic in the administrative procedures on the adoption of Regional Air Quality Management Plans that are currently being finalised on the grounds of the Act No. 202/2012 Coll., on Air Protection. Only then, the public would be able to participate properly, submit qualified comments and contribute to the solution of the long-term problem of air pollution in the Czech Republic. Moreover, we are convinced that the access to this data would enhance the awareness of the citizens on seriousness and long term impact of the air quality on their health and environment they live in. Frank Bold which focuses on the preparation of these plans is going both to participate in the procedures and help local citizens in the problematic areas to participate.

Second, Frank Bold provides free legal support in the public interest to civil associations and citizens in administrative and court proceedings (concerning among others compensations for health damage caused by air pollution) in order to force the Czech Republic to solve the situation, comply with the European legislation and adopt sufficient measures that would improve the air quality. The requested documents will enable Frank Bold to support these citizens more effectively and hence induce the state to enforce the improvement in the area of air pollution.

Moreover, the experience and know-how may be then shared within the network and best practice may be multiplied in other J&E network countries having problems with air pollution.

Further, the content of the requested documents is crucial to precisely inform the public both about the work of the Commission that is done in order to ensure correct application of the EU environmental law and its enforcement and about the air pollution in the Czech Republic and last but not least, feasible solutions.

Lastly, the requested documents could be considered by other environmental NGOs dealing with air pollution issues in the Czech Republic which might have useful comments and information for the purposes of the infringement procedure itself.

I.III

On the grounds of all the facts mentioned above, **we are convinced that in the sense of the CJEU case law, there is an overriding public interest in disclosure** of the information requested, namely because:

- taking into account the scope and intensity of the air pollution in the Czech Republic, namely in the most affected regions, the principle of transparency with regard to the related information is especially pressing and capable of prevailing over the reasons justifying the refusal to disclose the documents,
- the members of the public concerned, including Justice and Environment, its member organisation Frank Bold and the local NGOs and individuals, who at various levels aim to enforce the measures which would improve the current situation, should have a right to be informed of the extent to which the Czech Republic is not complying with the relevant EU environmental legislation, and
- disclosure of the required documents would help these members of the public concerned to effectively participate in concrete procedures, described above, and by that means serve the interest of protecting public health and the environment.

Moreover, we recall that the environmental information shall enjoy special treatment in respect of the second part of Article 6 paragraph 1 of Regulation (EC) No 1367/2006 which states that the grounds for refusal shall be **interpreted in a restrictive way**, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment. This is also the case of the documents requested.

II.

We are aware of the present approach of the Commission relating to the general non-disclosure of information relating to the EU pilot procedures and pre-litigation phase of infringement procedures – based on the argument that the aim is to give the Member State concerned an opportunity, on the one hand, to comply voluntarily with its obligations under EU law and, on the other hand, to avail of its right to defend itself against the objections formulated by the Commission, for which the secrecy and the “atmosphere of confidence” is necessary.

However, with reference to the case law of the European Court of Human Rights, **we are convinced that this long-term practice of non-disclosure of any documents relating to the infringement procedures is in breach of Article 10** of the European Convention on Human Rights and the **freedom to receive information** as interpreted by the Court. We refer especially to the case *Társaság a Szabadságjogokért v. Hungary*, judgment of the 14 April 2009, Application No 37374/05, where the European Court of Human Rights stated:

“(26) The Court has consistently recognised that the public has a right to receive information of general interest.

*(27) In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant’s activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society’s important contribution to the discussion of public affairs (see, for example, *Steel and Morris v. the United Kingdom* (no. 68416/01, § 89, ECHR 2005 II). **The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social “watchdog”...***

*(36) Moreover, the State’s obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available (see, a contrario, *Guerra and Others v. Italy*, 19 February 1998, § 53 in fine, Reports of Judgments and Decisions 1998-I) and did not require the collection of any data by the Government. **Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant.**”*

We are convinced that the above mentioned interpretation is fully applicable to the present situation and should be taken into account by the Commission.

Similarly, also the Charter of Fundamental Rights of the European Union guarantees in its Article 11 the right of access to information. According to this Charter *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”*. Access to information on infringement procedure shall thus be interpreted also in light of this fundamental EU document.

Further, we are convinced that the present approach of the Commission is in breach of the general EU principle of transparency which guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to citizens when transparent, and this contributes to strengthening the principle of democracy. Democratic states should be on duty to their citizens, not the officials representing them. A democratic state should not be afraid of informing its own citizens that it is not managing to comply with some of its obligations which – as a result – deteriorates the life of the citizens. This is one of the features of democratic systems, in contrast to non-democratic ones. The present secrecy-based-atmosphere-of-confidence-approach is actually violating the democratic values the EU otherwise stands for.

That is why we strongly appeal to the Commission to revise its approach to providing information on infringement procedures and make it transparent and open to the EU citizens.

III.

We are convinced that there are significant reasons (introduced above) why the access to documents requested by our request of 7 August 2015 should have not been refused.

We **have claimed and demonstrated the existence of the overriding public interest** which in the very case prevails over the supposed need for confidentiality already in our request for access to documents of 7 August 2015. However, the reply of the Commission merely stated that the public interest have not been identified and have not provided any reasoning reacting on the arguments presented by us.

Further, we requested the Commission to consider **also the option of a partial disclosure** of the documents applied for, given that it is highly improbable that all the correspondence between the Commission and the Czech Republic is covered by the exception pursuant to Article 4 para 2 of Regulation (EC) No 1049/2001. We are positive that either the claims of the Commission and the allegations of infringement as well as the laws that the Commission referred to as breached could be released without any negative impact on the entire process of infringement. Though, no reasoning why the partial disclosure is not possible has been provided.

On the grounds of the arguments presented above, we kindly request the European Commission to do more thorough examination and review its position regarding the refusal of access to documents in the said case.

Yours faithfully,
Justice and Environment