



**EUROPEAN COMMISSION
SECRETARIAT-GENERAL**

The Secretary General

Brussels,
SG.B.4/VD/bb - sg.dsg2.b.4(2015)4734019

By registered mail:

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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Confirmatory application for access to documents – GestDem
2014/4284**

Dear Ms Kiss,

I refer to your email of 8 September 2015, registered on the same day, pursuant to which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² ("Regulation 1049/2001").

1. SCOPE OF YOUR REQUEST

In your initial application of 7 August 2015, you requested access to the following documents forming part of the infringement procedure opened by the Commission against Czech Republic according to Article 258 of the Treaty on the Functioning of the European Union (TFEU):

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, pp. 43.

- *the Letter of Formal Notice of 16 July 2010, sent by the Commission to the Czech Republic;*
- *the answer of the Czech Republic on the Letter of Formal Notice, if existing*
- *the additional Letter of Formal Notice of 22 February 2013, sent by the Commission to the Czech Republic;*
- *the Reasoned Opinion issued by the Commission.*

The documents are part of the Commission's file in Case 2008/2186 concerning the proper implementation of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe³.

In its reply of 8 January 2015, the Directorate-General for Environment (hereafter DG ENV) refused access to the requested documents on the grounds of Article 4(2) third indent as their disclosure would undermine the protection of the purpose of inspections, investigations and audits.

Through your confirmatory application you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

2. DOCUMENTS CONCERNED

The following documents were identified as falling under the scope of your request:

1. The Commission's Letter of Formal Notice dated 28 January 2010 (Ref. SG(2010)D/905;C(2010)212)
2. The Czech Republic reply to the Letter of Formal Notice of 25 March 2010 (ref. INF(2010)100480)
3. Commission's Additional Letter of Formal Notice of 22 February 2013 (Ref. SG(2013)D/2321;C(2013)873)
4. Commission's Reasoned Opinion of 1 October 2010 (Ref. SG(2010)D/14957;C(2010)6524)
5. Commission's Reasoned Opinion of 26 March 2015 (Ref. SG(2015)D/3810;C(2015)1879).

3. EXAMINATION AND CONCLUSIONS

Having examined your request under the provisions of Regulation 1049/2001 and Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies

³ Official Journal J L 152 of 11.6.2008, pp. 1.

(Aarhus Regulation)⁴, I have come to the conclusion that the refusal by DG ENV has to be confirmed for the reasons set out below.

4. PROTECTION OF THE PURPOSE OF INVESTIGATIONS

Article 4(2), third indent, of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the purpose of inspections, investigations and audits.*

The documents which you seek to obtain belong to the administrative file of the ongoing infringement proceedings against Czech Republic concerning the implementation of Directive 2008/50/CE.

I note that you have explicitly indicated in your confirmatory request that you *are fully aware of the present case law of the Court of Justice of the European Union interpreting access to documents on infringement procedures* and that your request is based on the question of the overriding public interest in disclosure, which according to you outweighs the need for confidentiality in the present case.

I consider that it is therefore not necessary for me to reiterate or expand on the arguments put forward by DG ENV at the initial level regarding the established case-law on the existence of a general presumption of non-disclosure of documents relating to pending infringement proceedings and the need to ensure confidentiality of the dialogue between the Commission and the Member States concerned during infringement investigations and even further.

I confirm that in the present case the disclosure of the requested documents - which are part of the pending infringement investigations in Case 2008/2186 - would adversely affect the dialogue under Article 258 TFEU between the Czech authorities and the Commission⁵, in violation of Article 4(2), third indent of Regulation 1049/2001. The position of DG ENV that access must be denied on that basis must therefore be upheld.

5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interest protected by virtue of Article 4(2), third indent of Regulation 1049/2001.

⁴ Official Journal L 264/13 of 5.9.2006, pp. 13.

⁵ Judgment of 5 March 1997 in Case T-105/95, *WWF UK/Commission*, [1997] ECR II-3113.

In your confirmatory application, you put forward a series of arguments pointing to an overriding public interest in disclosure of the requested documents. I have taken them into account when considering granting access.

You argue that the environmental information you request should enjoy a special treatment. You refer in this regard to Article 6(1) of Regulation 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. In your view this is the case for the documents in question and they should be consequently disclosed.

I recall in this regard that the first sentence of Article 6(1) of the Aarhus Regulation, which concerns the limits of the right of access, provides that:

'As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringement of Community law [emphasis added], an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment'.

In its judgment in *Case LPN*, the Court of Justice clarified that *the first sentence of Article 6(1) of Regulation No 1367/2006, which lays down a rule intended to facilitate access to documents containing environmental information, provides that that rule does not apply to investigations, in particular those concerning possible infringements of Community law. It follows that infringement procedures are regarded, by that European Union legislation, as a type of procedure which, as such, has characteristics precluding full transparency being granted in that field and which therefore has a special position within the system of access to documents.*

The Court of Justice further stated that the wording of the first sentence of Article 6(1) of Regulation No 1367/2006 indicates clearly *the express intention of the legislature to remove infringement procedures from the scope of Article 6(1) of Regulation No 1367/2006 as a whole*⁶.

It is also noteworthy that the *LPN* case, similarly to the present request, concerned access to correspondence with a Member State on a case regarding alleged infringements of EU environmental law.

As the documents concerned by your request form part of an ongoing infringement procedure and in view of the wording of the first sentence of Article 6(1) of the Aarhus Regulation and the interpretation of the Court of Justice, I consider that that provision is not applicable in the present case.

⁶ Judgment of 14 November 2013 in joint cases C-514/11 P and C-605/11 P, *Liga para a Protecção da Natureza (LPN) v Commission*, paragraphs 54-55, 84.

Nevertheless, and notwithstanding the non-applicability of Article 6(1) of Regulation 1367/2006, please note that this decision is based on a restrictive interpretation of the exceptions of Article 4 of Regulation 1049/2001.

In your confirmatory application, you also argue that there is an overriding public interest justifying disclosure of the requested documents on the grounds that such environmental cases of pollution affect millions of citizens. You point out in this regard that the problem of air pollution is long-term and very serious and demands immediate solution, so having access to all relevant data is pressing and capable of prevailing over the reasons justifying the refusal.

The Court of Justice has indeed clarified that in certain cases transparency can constitute an overriding public interest if it is especially pressing and based on concrete elements⁷.

I fully agree that citizens should have wide access to information on environmental issues and their implementation in their Member State. It is true that putting an end to a possible infringement of EU law is a matter of public interest. It is precisely for that reason that the Commission is conducting these investigations. However, it is the Commission's experience - as confirmed by the EU Courts - that the public interest in clarifying the issues at stake and, if applicable, in reaching conformity of that Member State, is better served by maintaining the atmosphere of mutual trust between the Commission and the Member State concerned. This is also true in cases where alleged infringements may have serious effects, including on the health of citizens. Particularly in such serious cases, it is vital to find an effective solution to the possible existence of an infringement and achieve rapid compliance. It is my view that such solution can best be found by maintaining the atmosphere of mutual trust between the Commission, as guardian of the Treaties, and the Member State(s) concerned, so that it is ultimately in the interest of the public that the Commission respects this mutual trust.

Therefore, contrary to your assertion, I consider that public disclosure of the requested documents would not promote but hinder the attainment of the purpose of the infringement procedure, which is to encourage the amicable resolution of possible infringements to maximum possible extent and within the shortest period of time, in order to avoid referrals of the matter by the Commission to the Court of Justice.

You further state that your organisation is a network of 12 green NGOs located in several EU countries with a focus of promoting stronger environmental legislation and implementation on both the national and EU level. You add that your experts provide support to affected people living in the regions which are the most polluted in the EU and that you need the requested information in order to promote the protection of health of citizens and of the environment in the Czech Republic by effectively enforcing the improvement of air quality standards.

⁷ Judgment of the Court of Justice of 21 September 2010 in case C-514/07, *Sweden and Others v API and Commission*, paragraph 156.

I understand your role and commend the work of your organisation in promoting environmental standards. However, the Court of Justice has confirmed that general considerations - such as the need for an NGO to fulfil its statutory aims - do not constitute an overriding public interest in disclosure⁸.

Finally, in challenging the Commission's general approach in dealing with access to documents in pending infringement investigations, you also make a reference to the case-law of the European Court of Human Rights (ECHR) and Article 10 (freedom to receive information) of the European Convention of Human Rights, as well as to Article 11 (the right of access to information) of the Charter of Fundamental Rights of the EU. You consider that the Commission's approach breaches the fundamental right of access and the principle of transparency and urge the Commission to depart from what you called *the secrecy-based-atmosphere of confidence approach* and make the infringement procedures transparent and open to the EU citizens.

I would like to inform you in this regard that the fundamental right of access to documents is not an absolute right and that certain restrictions of that right - based on the applicable laws and jurisprudence - are fully justified. As explained above, the Commission's approach in the present case and in other cases relating to pending infringement proceedings is based on a careful assessment of each case and the application of the relevant exceptions and jurisprudence.

Last but not least, I draw your attention to paragraph 60 of the judgment in the *Technische Glaswerke Ilmenau* case⁹, where the Court confirmed that in administrative matters, such as the ones at stake, the public interest in transparency does not carry the same weight as in legislative matters.

In view of the above considerations, I consider that the prevailing interest in this case is best served by protecting the purpose of the on-going investigations in order to ensure the proper implementation of Directive 2008/50.

6. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the requested documents, in accordance with Article 4(6) of Regulation No 1049/2001.

Pursuant to settled case-law, *documents covered by [general] presumptions [of non-disclosure] fall outside the scope of the obligation to disclose their content, in full or in part.*¹⁰

⁸ Idem, paragraph 95.

⁹ Case C-139/07.

¹⁰ See *inter alia* the following ECJ decisions: *Enbw* in case C-365/12, § 134; *Editions Odile Jacob* in case C-404/10 P, §133; and more recently, the *Schenker* judgment of the General Court in case T-534/11, §108.

It follows from the assessment set out above that the requested documents are part of a pending infringement file of the Commission, and are as such covered by a general presumption of non-disclosure.

Consequently, partial access is not possible in this instance, and the documents concerned remain entirely protected by the exception under Article 4(2), third indent of Regulation 1049/2001.

7. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours faithfully,

A handwritten signature in black ink, consisting of a long horizontal stroke with a curved line crossing it from the bottom left to the top right.

Alexander Italianer