European Commission

Brussels, 1.8.2024
C(2024) 5681 final

Mr Jarno Liski

Decision of the European Commission pursuant to Article 4 of the Implementing Rules to Regulation (EC) No 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – EASE 2024/2124

Dear Mr Liski,

I refer to your email of 28 May 2024, registered on the same day, by which you lodged a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’). Please accept our sincere apologies for the delay in replying to your request.

1. Scope of Your Request

In your initial application of 22 April 2024, registered on the same day, you requested access to, I quote:

‘All the documents relating to the infringement proceedings (including informal stages) brought by the European Commission against the Republic of Finland relating to the implementation of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.’

2 OJ L145, 31.05.2001, p. 43.
Given the subject-matter of your application, its processing was attributed to the Directorate-General for Justice and Consumers (hereinafter ‘DG JUST’).

In its initial reply of 13 May 2024, DG JUST identified the following four documents related to the infringement case INFR(2020)2320 as falling under the scope of your request:

- Document 3: Additional letter of formal notice under Article 258 TFUE to the Republic of Finland dated 26 January 2023 (C(2023)153 final).
- Document 4: Reply of the Republic of Finland to the additional letter of formal notice dated 23 March 2023 (INF(2023)000415).

After examining the identified documents, DG JUST refused access to them based on the exception laid down in the third indent of Article 4(2) (protection of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of DG JUST’s refusal to grant you access to the documents, arguing the existence of an overriding public interest based on the principle of legislative transparency. Moreover, you hold that pursuant to Article 4(4) and (5) of Regulation (EC) No 1049/2001, Finnish authorities should have been consulted with respect to the documents originating from them.

2. **Assessment and Conclusions under Regulation (EC) No 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General of the Commission conducts a review of the reply issued by the Directorate-General concerned at the initial stage.

Following its review, the Secretariat-General informs you that public access to the documents requested must be refused on the basis of the exception laid down in the third indent of Article 4(2) (protection of inspections, investigations and audits) Regulation (EC) No 1049/2001, for the reasons set out below.

2.1 **Protection of the purpose of inspections, investigations and audits**

The third indent of Article 4(2) of Regulation (EC) No 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, unless there is an overriding public interest in disclosure’.
The requested documents form part of the administrative file of an ongoing infringement procedure against Finland, registered under reference INFR(2020)2320. On 18 February 2021, the Commission opened this infringement procedure by sending a letter of formal notice (Document 1) to Finland with the view of establishing the possible infringement of Council Framework Decision 2008/913/JHA of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal law by the Republic of Finland. The Framework Decision aims to ensure that serious manifestations of racism and xenophobia are punishable by effective, proportionate, and dissuasive criminal penalties throughout the EU. In the Commission’s view, the Finnish legislation incorrectly transposes hate speech inciting violence and fails to criminalise hate speech when addressed to individual members of a group defined by reference to race, colour, religion, descent or nationality or ethnic origin. In addition, Finland fails to criminalise the specific forms of hate speech, namely the public condoning, denial, or gross trivialisation of international crimes and the Holocaust.

When the Commission sends a letter of formal notice to a Member State under Article 258 of the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’), this is considered to be the first step of the pre-litigation process, during which a strict requirement of confidentiality applies, on the ground that the discussions between the Commission and the Member State in question may well lead to the latter’s voluntary compliance with the Treaty requirements. Indeed, the purpose of the pre-litigation procedure laid down in Article 258 TFEU is to put an end to the infringement.

The Republic of Finland replied to the Commission’s letter of formal notice with new information relating to the concerns raised by the Commission (Document 2). Having analysed this additional information, the Commission found further transposition issues in addition to the concerns already raised in the letters of formal notice that needed to be specifically addressed. To that end, the Commission decided to send an additional letter of formal notice (Document 3). Finland replied to the latter by 23 March 2023 (Document 4).

Please note that the activities of the Commission while overseeing the implementation of legal commitments by a Member State meet the criteria defined by the Court of Justice in Schlyter to constitute an investigation. In this judgment the Court held that ‘a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the EU and FEU Treaties must be considered to be an investigation.’

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5 February infringements package: key decisions (europa.eu)
7 January Infringements package: key decisions (europa.eu)
9 Ibid.
In fact, ‘the concept of ‘investigation’ can also cover a Commission activity intended to establish facts in order to assess a given situation’\(^{10}\).

As explained above, the dialogue with the Finnish authorities and the investigative activities to which the documents relate are fully ongoing under Article 258 TFEU. In fact, there has been no decision by the Commission to close the infringement procedure under reference INFR(2020)2320. The additional letter of formal notice sent by the Commission forms part of the infringement procedure opened on 18 February 2021.

Given that the infringement procedure is ongoing, the argument in your confirmatory application according to which ‘the Republic of Finland should have been consulted for disclosure of the two documents originating from them’ cannot be considered valid. Please note that, pursuant to Article 4(4) and 4(5) of Regulation (EC) No 1049/2001, the institution shall consult a third party with a view to assessing whether an exception in paragraph 1 or 2 of Article 4 of the regulation is applicable unless it is clear that the documents shall or shall not be disclosed. Since, in the case at hand, the documents in question are covered by the general presumption of confidentiality under the third indent of Article 4(2) of Regulation (EC) No 1049/2001, as laid out below, the Secretariat-General confirms that it is clear that the documents shall not be disclosed. Consequently, there is no obligation on the Commission to consult the Republic of Finland in this regard.

In order for the Commission to be able to carry out its tasks and to settle disputes in the framework of infringement proceedings, there has to be a climate of mutual trust between the Commission and the Member State concerned, throughout the different stages of the procedure until the investigation has been definitively closed, irrespective of how long such proceedings last. In fact, the General Court has recognised the importance of ‘an atmosphere of mutual trust between the Commission and the Member States concerned in order to enable them to start a process of negotiation and compromise with a view to an amicable settlement of the dispute’\(^{11}\).

Public disclosure of the documents to which you request access would not only negatively influence the dialogue between the Commission and the Finnish authorities, for which a climate of mutual trust is essential, but would also hinder the Commission in defining the line to take for this file, free from outside interference. Where the Commission considers that a Member State has failed to fulfil its obligations, it is for the Commission to assess whether it is appropriate to intervene against that state, to identify the provisions which it is alleged to have infringed and to choose the date on which to initiate infringement proceedings against it\(^{12}\).

\(^{10}\) Ibid, paragraph 47.
This is the case even though, as you argue in your confirmatory request, the documents relate to a legislative activity in Finland and the need to update national legislation to reflect the requirements of the Framework Decision which is currently subject to broad societal discussion. Indeed, the Court has confirmed that it is in the public interest for the Commission to clarify itself whether EU law has been complied with by the given Member State.\(^{13}\)

Thus, given the ongoing nature of the procedures in question, the disclosure of the documents requested would expose the relevant Commission departments to the foreseeable risk of coming under outside pressure. This would be detrimental to the proper conduct of the investigations and undermine their effectiveness. Unquestionably, the purpose of such investigations is best achieved free from external pressure.

Consequently, the disclosure of the documents requested, at this stage of the infringement procedure to which they pertain, would essentially deprive the Finnish authorities of their lawful expectation of sincere cooperation on the part of the Commission in the course of the infringement procedure in question. This would not only negatively influence the negotiations in which the Commission and the national authorities have engaged with the objective that the Member State complies voluntarily with Union law but would also alter the strictly bilateral nature of the infringement procedure.

Please note that the Court has interpreted the third indent of Article 4(2) of Regulation (EC) No 1049/2001 in its \textit{LPN and Finland v European Commission} judgement, where it underlined that in ongoing infringement cases, the institution may apply a general presumption of non-disclosure.\(^{14}\) The Court held that ‘it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001’\(^{15}\). This confirmed the Court’s earlier \textit{Petrie v Commission} judgment, in which it ruled that ‘[…] the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure'.\(^{16}\)


\(^{15}\) Ibid, paragraph 65.

The Court of Justice further specified that ‘[…] all the documents, irrespective of whether they had been drawn up during the informal stage of that procedure, that is to say before the Commission sent the letter of formal notice to the Member State concerned, or during the formal stage thereof, that is to say after that letter was sent, were regarded as being covered by that presumption’17.

The Court of Justice also considered that ‘the documents relating to the pre-litigation stage of an infringement procedure constitute a single category of documents for the purposes of applying the abovementioned general presumption’18 and that ‘the fact that documents had been placed on the file in an administrative procedure was decisive for the purpose of concluding that those documents were connected with that procedure’19.

Under these circumstances, the Secretariat-General considers that there is a real and non-hypothetical risk that the disclosure of the documents requested would adversely affect the ongoing investigation in the INFR(2020)2320 case, as well as its eventual follow-up. In order for the Commission to be able to carry out its tasks, there has to be a protected space throughout the different stages of the above-mentioned infringement procedure, all the way until its definitive closure.

Against this background, the Secretariat-General confirms that the documents falling under the scope of your application, i.e., Documents 1, 2, 3, and 4, are manifestly covered, in their entirety, by the exception referred to in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 and need to be protected on this basis.

2.2 Overriding public interest in disclosure

Pursuant to Article 4(2) of Regulation 1049/2001, the exceptions to the right of access to documents contained in that provision shall be waived if there is an overriding public interest in disclosure of the documents requested. Such an interest must, firstly, be public (as opposed to private interests of the applicant) and, secondly, outweigh the harm caused by disclosure, i.e., in this case it must outweigh the interests protected under Article 4(2), third indent of Regulation 1049/2001. It is for the applicant to put forward specific circumstances that show that there is an overriding public interest, which justifies the disclosure of the documents concerned20.

18 LPN and Republic of Finland v Commission, C-514/11 and C-605/11 P, cited above, paragraph 64.
In this regard, according to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of access to the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal\(^21\).

On a preliminary basis, as the General Court has underlined, the European Commission ensures that the public is informed about the progress of specific infringement cases through the regular publication of press releases\(^22\). In the case at hand, the public was informed about the transmission by the European Commission of the relevant letter of formal notice and additional letter of formal notice to the Finnish authorities in press memo INF/21/441 on the infringement package of 18 February 2021\(^23\) and in press memo INF/23/142 on the infringement package of 26 January 2023\(^24\) respectively. You can also consult details of infringement procedures on the European Commission’s dedicated website\(^25\).

In your confirmatory application, you argue that there is an overriding public interest in disclosing the requested documents because ‘account should be taken of the principle of openness and its relevance for democratic legitimacy’. According to you, the Court found that ‘the consideration of those passages is also likely to contribute to reducing doubts in the minds of citizens, not only as regards the lawfulness of the contested regulation but also as regards the legitimacy of the legislative process as a whole, it serves in any event the overriding public interest’\(^26\). More specifically, you claim that despite relating to an ongoing infringement procedure, the documents also relate to legislative activity in the Republic of Finland and that the principle of transparency should apply mutatis mutandis to national procedures and that wider access should be granted to legislative documents based on Recital 6 of Regulation (EC) No 1049/2001. In this regard you refer to the case-law of the Court of Justice\(^27\), according to which transparency and openness of the legislative process contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act, which is the case for the documents identified in this instance.

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23 February infringements package: key decisions (europa.eu)

24 January Infringements package: key decisions (europa.eu)

25 Application of EU law - European Commission (europa.eu)


Please note that the fact that the documents requested relate to or form the basis of a national legislative act does not alter their nature at EU level, nor does it change the fact that they form part of an ongoing infringement procedure. On the contrary, forming part of the ongoing infringement file INFR(2020)2320, the documents in question do not relate to any EU legislative act, for which the Court of Justice has acknowledged the existence of wider openness, but rather to an administrative procedure. The European Commission has no competence to intervene in the national legislative process.

Moreover, according to the established case-law of the Court of Justice, general considerations relating to the principle of transparency and the right of the public to be informed about the work of the institutions cannot justify the disclosure of documents relating to the pre-litigation phase of an infringement procedure. In cases covered by a general presumption of non-disclosure, the principle of transparency can only prevail over the reasons justifying the refusal to disclose if that principle is especially pressing.

Please note that, as the Court has clarified, an overriding public interest cannot be inferred from the applicant’s or society’s wish to assess a Member State’s compliance with EU law. The General Court has also found that an individual’s interest in scrutinising compliance of a Member State’s national legislation with EU law, following a complaint lodged against that Member State with the European Commission on the same subject matter, does not constitute an overriding public interest in disclosure of documents pertaining to the European Commission’s investigation of the potential instance of non-compliance. According to the Court of Justice, in such an event, the public interest concerned, namely the correct application of EU law by that Member State, is most effectively protected when it is assessed and verified by the Commission.

Furthermore, as ruled in the same judgement, substantiating an application for access to documents with the intention to review the Commission’s conduct of activities in the framework of its investigation aimed at verifying correct application of EU law by a Member State amounts to denying the existence of the discretion enjoyed by the institution in the context of infringement procedures. The general presumption of confidentiality applicable to all documents relating to such procedures is specifically intended to protect the effectiveness of the Commission’s actions in those proceedings.

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28 Judgement of the Court of Justice of 29 June 2010, Commission v Technische Glaswerke Ilmenau, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60.


30 Judgment of 21 September 2010 in case C-514/07, Sweden and Others v API and Commission, ECLI:EU:C:2010:541, paragraphs 93 and 158.


32 Anikó Pint v European Commission, T-634/17, cited above, paragraph 53.

33 Ibid, paragraph 66.
Consequently, the arguments put forward in your confirmatory application do not demonstrate a pressing need for the disclosure of the documents pertaining to the ongoing procedure against a Member State. Any public interest in transparency and accountability in the decision-making is best served at this stage by protecting the ongoing bilateral procedure with the Finnish authorities under investigation to ensure that the national legislations are in conformity with European Union-wide rules.

It follows from the foregoing that you have not established the existence of an overriding public interest within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 in this particular case. Nor has the Secretariat-General been able, based on the elements at its disposal, to establish the existence of any public interest in the disclosure of the documents in question that would override the real and non-hypothetical harm that such disclosure would do.

3. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has also considered the possibility of granting partial access to the requested documents.

In your confirmatory request, you hold that ‘the documents are likely to contain passages from existing legislation, parliamentary and government documents that are already in the public domain and cannot become confidential because they are now contained in documents held by the European Commission’.

However, as per settled case-law, where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full, or in part. Irrespective of whether passages of the documents requested may be in the public domain, the disclosure of the prelitigation documents concerning the infringement procedure against the Republic of Finland risks altering the nature and progress of that procedure, and, accordingly, would undermine the protection of purpose of investigations within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, if disclosed.

Consequently, the Secretariat-General concludes that the requested and identified documents are covered in their entirety by the invoked exception to the right of public access.

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34 Judgment of the Court of Justice of 28 June 2012, Commission v Éditions Odile Jacob, C-404/10 P, cited above, paragraph 133.
4. **Means of Redress**

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified, respectively, in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

*For the Commission*

*Ilze JUHANSONE*

*Secretary-General*