



EUROPEAN COMMISSION

Brussels, 5.9.2019
C(2019) 6502 final

GR 15669 Papagou
Greece

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/2498**

Dear [REDACTED]

I refer to your letter of 7 June 2019, registered on the same day, in 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 (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 25 April 2019, addressed to the Directorate-General for Environment, you requested access to '(1) the Hellenic Republic's reply to this letter [the letter of formal notice sent by the European Commission to the Hellenic Republic in infringement case no. 2014/4073, on 11 July 2014], (2) newer letters or Commission documents in general regarding this case and any replies the Hellenic Republic has received' (hereafter: 'requested documents').

In its initial reply of 17 May 2019, Directorate-General for Environment refused access to the requested documents based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

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

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

In your confirmatory application, you request a review of this position. You support your request with additional arguments, which I will address, to the extent necessary, in the corresponding sections below.

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 conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of Directorate-General for Environment to refuse access to the requested documents, based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, for the reasons set out below.

As a preliminary note, I have to point out that the infringement no. 2014/4073 is an on-going procedure and the requested documents form part of its administrative file. The European Commission considers infringement procedures as a form of investigation.

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'.

It is settled case-law of the Court of Justice that, '[...] the Member States are entitled to expect the European Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access [...] on the ground of protection of the public interest relating to inspections, investigations and court proceedings. [...]'³

Public access to documents forming part of on-going investigations can be refused under the third indent of Article 4(2) of Regulation (EC) No 1049/2001 based on a general

³ Judgment of the Court of First Instance of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

presumption. The Court of Justice ruled that, ‘documents relating to an infringement procedure during the pre-litigation stage may be covered by the general presumption of confidentiality [because] “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”’.⁴

The Court of Justice specified that this general presumption covered all documents relating to the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union: ‘[c]onsequently, [...] 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’.⁵

Therefore, the disclosure of the requested document at this stage of the procedure would essentially deprive the Greek authorities from their lawful expectation of sincere cooperation on the part of the European Commission during the infringement procedure. Refusal of access to the requested document is therefore based on Article 4(2), third indent (protection of the purpose of the investigations), of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue essentially that five years have passed since the sending of the letter of formal notice and the public have still not been informed in detail in relation to the dialogue that takes place between the Hellenic authorities and the European Commission in relation to the developments of the infringement procedure mentioned above. Furthermore, you state that the disclosure of the requested documents would help citizens in the procedures launched before national courts, as it would allow the national courts to take into account the arguments contained therein. In your view, this is a factor that constitutes an overriding public interest. Finally, you argue, that even if Greece will comply with the relevant EU legislations at some later point in time, Natura 2000 areas would have been irretrievably damaged by that time.

⁴ Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v Commission*, joined cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 40.

⁵ *Ibid.*, paragraph 41.

However, the General Court acknowledged that ‘the individual interest which may be asserted by a requesting party in obtaining access to documents concerning him personally cannot generally be decisive for the purposes both of the assessment of the existence of an overriding public interest and of the weighing up of interests under the third indent of Article 4(2) of Regulation No 1049/2001.’⁶ Finally, I note that the objective of halting any potential deterioration of Natura 2000 sites can be better reached via the various law enforcement tools the European Commission employs in order to ensure Member States’ full implementation of EU law. One of these tools is the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union. The European Commission referred Greece to the Court of Justice of the European Union⁷ precisely because of the lack of adequate protection of Natura 2000 areas, as you mentioned in your recent correspondence.

Therefore, I consider that the public interest is better served in this case by ensuring the conclusion, in all serenity, of the infringement investigation, without jeopardising the dialogue between the European Commission and the Member State for which, as pointed out above, a climate of trust is essential.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

However, as stated by the Court of Justice, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part.⁸

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

⁶ Judgment of the General Court of 26 May 2016, *International Management Group v European Commission*, T-110/15, EU:T:2016:322, paragraph 56.

⁷ https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4257

⁸ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.

5. 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

