



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS

The Director-General

Brussels
HOME.D.1/AI

**By registered letter with
acknowledgment of receipt**

Mr De Capitani
Rue Darwin 11
1190 Brussels

Advance copy by email:
edecapitani@gmail.com

**Subject: Your applications for access to documents – Ref Gestdem 2020/6242
and 2020/6261**

Dear Mr De Capitani,

We refer to your e-mail dated 18/10/2021 in which you make a request for access to documents, registered on 19/10/2021 under the reference number GestDem No 2020/6242 and your request registered on 20/10/2021 under the reference number GestDem No 2020/6261.

You requested:

- the compliance assessment of the Transposition of the EU Directive on PNR (Directive (EU) 2016/681) carried out by 'Milieu Law and Policy Consulting';
- the complementary assessment (if it has been completed) of the same 'Milieu Law and Policy Consulting' dealing with transposition measures adopted by FI, NL and SI.

Your applications concern the following document:

- Assessing the completeness and conformity of measures of Member States to transpose Directive (EU) 681/2016 ('PNR Directive'), Overall Report - Specific Contract No. HOME/2018/ISFP/FW/PNRX/0094 (implementing FWC No. HOME/2016/FW/LECO/0001) – September 2019 (Ares(2020)4436596);
- Assessing the completeness and conformity of measures of Member States to transpose Directive (EU) 681/2016 ('PNR Directive'), Overall Report – Specific Contract No. HOME/20178/ISFP/FW/PNRX/0094, as updated by Specific Contract No. HOME/2019/ISFP/FW/LECO/0026 (implementing FWC No. HOME/2016/FW/LECO/0001) – February 2021 (Ares(2021) 6505841).

Following an examination of the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents,¹ I regret to inform you that your applications cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation. In particular, the refusal is based on the exceptions of Article 4(2), second indent (protection of court proceedings and legal advice), and third indent (the purpose of inspections, investigations and audits), as well as Article 4(3), first subparagraph of the Regulation (protection of ongoing decision-making process), for the reasons set out below.

Protection of court proceedings

Article 4(2), second indent, of Regulation 1049/2011 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings and legal advice [...].'

Several references for a preliminary ruling have been recently submitted to the Court of Justice in relation to the PNR Directive by national courts in Belgium and Germany.² The questions referred to the Court concern, in particular, the compatibility of the Directive with the right to respect for private life and the protection of personal data. The Commission's assessment of Member States' compliance is likely to feature among the elements considered by the Court when examining the necessity and proportionality of the Directive in such cases. Consequently, the aforementioned documents cannot be disclosed at this stage pursuant to the aforementioned exception.

Protection of the purpose of investigations

Article 4(2), third indent, 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 [...].'

In its *LPN* judgment,³ the Court of Justice of the European Union concluded that there is a general presumption of non-disclosure of documents in relation to ongoing infringement proceedings. With this judgment, the Court of Justice confirmed the earlier judgment of the Court of First Instance (now the General Court) in *Petrie*,⁴ where it decided that 'the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure.'

The documents that you seek to obtain relates to ongoing investigations regarding possible infringements of EU law. Disclosure of the requested documents at this point in time would affect the climate of mutual trust between the authorities of the Member States involved and the Commission, which is essential in order to resolve the relevant cases if possible without a referral to the Court of Justice. It would deprive the national authorities from their lawful expectation of sincere cooperation on the part of the European Commission during the

¹ OJ L 145, 31.5.2001, p. 43–48.

² Request for a preliminary ruling in Case C-817/19 *Ligue des droits humains*, OJ C 36, 3.2.2020, p. 16–17 (pending), request for a preliminary ruling in joined Cases C-148/20, C-149/20 and C-150/20 *Deutsche Lufthansa* (pending) and request for a preliminary ruling in joined Cases C-215/20 and C-222/20 *Bundesrepublik Deutschland u.a.* (pending)

³ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 65–68.

⁴ Judgment of the Court of First Instance of 11 December 2001 in Case T-191/99, *Petrie a.o. v European Commission*, ECLI:EU:T:2001:284, paragraph 68.

infringement procedure and during the court proceedings. Moreover, disclosure of the document in this politically sensitive case could expose the Court and the Parties to outside pressure.

Protection of the decision-making process

Pursuant to settled case-law, the exception under Article 4(3), first subparagraph, of Regulation 1049/2001 may be applied where disclosure of preparatory documents would result in a serious, non-hypothetical and objectively justified risk of self-censorship.⁵ The General Court acknowledged that the Commission ‘must [...] be placed in a position to decide [...] wholly independently, in the general interest and free from any external pressure or third-party influence [...] on the policy initiatives to be proposed [...].’ This is all the more important in order to preserve the essence of the power of initiative conferred on the Commission by the Treaties and its capacity to assess, wholly independently, the appropriateness of a policy proposal. More specifically, it is important to protect that power of initiative from any influences exerted by public or private interests which would attempt, outside of organised consultations, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion taking place within that institution.⁶

The Commission adopted, on 24 July 2020, a report⁷ outlining the results of reviewing the application of the PNR Directive, enclosed for your information to this letter.⁸ As indicated in the report, the Commission will continue to monitor the implementation of the PNR Directive and, on the basis of a continued dialogue with the Member States, assess the necessity to launch infringement proceedings for non-conform implementation. In light of the review and the results of the compliance assessment, the Commission will also decide on the possible revision of the PNR Directive. Such decisions will be informed by the outcome of the preliminary ruling requests currently before the Court of Justice (referred to above).

In this context, the information contained in the requested documents was provided by the Member States to the Commission with a reasonable expectation of confidentiality. The Commission has taken utmost care in upholding this confidential character, to the extent that the documents has not even be shared with the Member States themselves. Revealing the requested documents would erode the atmosphere of mutual trust in the context of the ongoing work to ensure the full implementation of the EU PNR mechanism.

In particular, the disclosure of the compliance assessment can be expected to dissuade the Member States from submitting additional information, positions and data to the European Commission. This would seriously undermine the current and future decision-making process concerning the next steps in relation to both infringements and the possible revisions of the Directive by lowering the quality of the evidence available.

Overriding public interest

The exceptions laid down in Articles 4(2) and 4(3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must,

⁵ Judgment of 18 December 2008, Case T-144/05 *Muniz v Commission*, ECLI:EU:T:2008:596.

⁶ Judgment of the General Court of 13 November 2015 in Joined Cases T-424/14 and T-425/14 *ClientEarth v European Commission*, ECLI:EU:T:2015:848.

⁷ COM(2020) 305 final.

⁸ Also available on-line under [EUR-Lex - 52020DC0305 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/lexuri/ui.do?uri=COM(2020)305%20final).

firstly, be public and, secondly, outweigh the harm caused by disclosure. We consider that at this stage of the procedure, the public interest is best served by protecting the climate of mutual trust between the Commission and the governments of the Member States concerned in order to achieve full compliance by that Member State with the relevant Union legislation. We consider that an eventual interest in making the content of the documents public does not outweigh the harm disclosure would cause to the interests protected by the invoked exceptions.

In this respect, it should also be noted that a summary of the information included in the compliance assessment has been presented in the aforementioned review report and its accompanying staff working document⁹, enclosed for your information to this letter.¹⁰ These documents provide detailed information to the public on the implementation of the PNR Directive, including as regards its overall transposition into national law. At the same time, by not mapping particular measures to specific Member States, the documents safeguard the confidentiality of the compliance assessment.

Partial access

We have considered whether partial access could be granted to the documents requested. We believe it is not possible to grant access to an expunged version of the documents, as it is entirely covered by the above mentioned exceptions.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[e-signed]
Monique PARIAT

Encl.: Report from the Commission to the European Parliament and the Council on the review of Directive 2016/681, COM(2020) 305 final, and accompanying Staff Working Document, SWD(2020) 128 final.

⁹ SWD(2020) 128 final.

¹⁰ Also available on-line under [EUR-Lex - 52020SC0128 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/uri/CELEX/52020SC0128).