

EUROPEAN COMMISSION
DIRECTORATE-GENERAL MIGRATION and HOME AFFAIRS

The Director General

Brussels, **07. 04. 2015**
HOME/RV/vdb/ home.d2(2015)1360215

*By registered letter with
acknowledgment of receipt*

Ms Sabine McNeill
21a Goldhurst Terrace
Kilburn
London
NW6 3HB
United Kingdom

ADVANCE COPY BY E-MAIL :
sabine@3d-metrics.com

**Subject: Your application for access to documents
ref. GestDem n°2015/1562, 2015/1563, 2015/1564**

Dear Ms McNeill,

We refer to your e-mail dated 13/03/2015 in which you make a request for access to documents, registered on the same day under the above mentioned reference numbers.

Your application concerns the following documents:

GestDem 2015/1562

Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography

GestDem 2015/1563

Copy of Infringement Notice (2014)219/F

GestDem 2015/1564

Copy of Letter of Formal Notice 258 (ex 226) / Infringement No 20140219 / UK.

Having examined the documents requested under the provisions of Regulation (EC) n°1049/2001¹ regarding public access to documents, I have come to the following conclusion:

1) With regard to the request of a copy of Directive 2011/93/EU (GestDem 2015/1562),

the Directive is directly accessible to the public in electronic form at the following link:
<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426691483819&uri=CELEX:32011L0093>

¹ REGULATION (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

We are also sending to you a hard copy of the Directive. EU law and other public EU documents are available free of charge in EUR-Lex at the following link: <http://eur-lex.europa.eu/content/welcome/about.html>

2) With regard to the copy of infringement notice and letter of formal notice (GestDem 2015/1563 and GestDem 2015/1564),

having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I inform you that the two references you give refer to only one document (letter of formal notice). I regret to inform you that your application cannot be granted, as disclosure is prevented by the exception to the right of access laid down in Article 4(2) third indent of this Regulation which provides that: "*The 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 relate to an ongoing investigation regarding a possible infringement of EU law by the United Kingdom. The infringement procedure is pending and the Commission has not yet decided whether to send a reasoned opinion to the Member State under Article 258 TFEU or to close the procedure on the basis of the information provided. Disclosure of the requested documents at this point in time would affect the mutual trust between the authorities of United Kingdom and the Commission, which is required to enable them to resolve the case possibly without having to refer it to the Court of Justice.

This interpretation has been confirmed by the Court of First Instance, in particular at paragraph 68 of the *Petrie* judgment²:

"68 As the Court pointed out in paragraph 63 of its judgement in *WWF* (cited above in paragraph 59), the Member States are entitled to expect the 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 judgement of the Court of Justice.... "

In addition to this, in interpreting Article 4 (2), third indent, of Regulation No 1049/2001, the Court of Justice has emphasized the bilateral nature of an administrative procedure between the Commission and the concerned Member State, from which followed the absence of access rights. The Court stated in the *Ilmenau* judgment³ that

"the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file. Account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001. If those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question"

² Case T-191/99, *Petrie v. Commission*, ECR [2001] I-3677, para. 68

³ Case C-139/07 *Commission v. Ilmenau*, ECR 2010-I-05885, in particular para 58.

For this reason, the Court of Justice acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines the protection of the objectives of investigation activities. Like the procedure for reviewing State aid, infringement proceedings on the basis of Articles 258 or 260 TFEU are of a bilateral nature in which the Commission's position is only addressed to the Member State concerned and as such the correspondence is subject to the same protections.

This has been confirmed by the Court of Justice in a judgment of 14 November 2013 regarding access to correspondence with a Member State on a case regarding alleged infringements of EU environmental law. In that judgment, the Court of Justice has acknowledged the existence of a general presumption that disclosure of documents in infringement proceedings in principle undermines the protection of the objectives of investigation activities, as long as these proceedings are ongoing⁴.

We have considered whether partial access could be granted to the document requested. For the same reasons as explained above, we are of the opinion that partial access cannot be given.

The exception laid down in Article 4(2), third indent of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure.

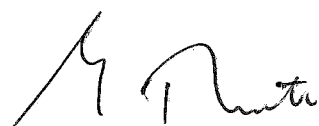
We consider that at this stage of the procedure, the public interest is best served by protecting the climate of mutual trust between the Commission and the Government of United Kingdom in order to achieve full compliance by that Member State with the relevant Union legislation.

In accordance with Article 7(2) of Regulation 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
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Bruxelles
or by e-mail to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Matthias Ruete

⁴ Joined Cases C-514/11 P and C-605/11 P, *LPNv Commission*, paragraph 65