



EUROPEAN COMMISSION
Secretariat-General

The Secretary-General

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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: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2015/1563+1564**

Dear Ms Kurjo McNeill,

I refer to your email of 2 May 2015, registered on 4 May 2015, 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 documents ("Regulation 1049/2001").

1. SCOPE OF YOUR REQUEST

On 13 March 2015 you addressed two initial applications to the Directorate-General for Justice and Consumers (hereinafter, DG JUST) requesting access to the same document, i.e. *C(2014)219/F - Infringement notice* (GESTDEM 2015/1563) and *[t]he letter that has been sent from the commission to the UK authorities* in the context of infringement procedure 2014/0219.

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

Since the Directorate-General for Migration and Home Affairs (DG HOME) is the Directorate-General responsible for dealing with the policy area in question, the two initial applications were reattributed to the latter.

The Commission has identified the following document as falling under the scope of your requests:

- Letter of formal notice of the European Commission sent to the authorities of the United Kingdom within the infringement procedure 2014/0219, concerning the transposition by the United Kingdom into national law of Directive 2011/93/EU on combating child sexual abuse and exploitation, C(2014) 500/28.

This document was drawn up by the Commission in the framework of the infringement proceedings conducted by DG HOME in case 2014/0219 pursuant to Article 258 of the Treaty on the Functioning of the European Union (TFEU).

Currently these infringement proceedings are open and fully on-going.

In its initial reply of 7 April 2015, DG HOME refused access to the document based on the exception of Article 4(2), third indent (protection of the purpose of investigations) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 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 DG HOME to refuse access, based on the exception of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation 1049/2001, for the reasons set out below.

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

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, unless there is an overriding public interest in disclosure.*

The letter of formal notice to which you request access forms part of the procedure laid down in Article 258 TFEU, which consists of two consecutive stages, the administrative pre-litigation stage and the judicial stage before the Court of Justice. The purpose of the pre-litigation procedure is to allow the Member State to put an end to any alleged infringement, to enable it to exercise its rights of defence and to define the subject-matter of the dispute with a view to bringing an action before the Court.²

As mentioned above, the infringement proceedings 2014/0219 are open and on-going. Public disclosure of the document related to this infringement procedure would not only negatively influence the dialogue between the Commission and the United Kingdom for

² Judgment of 10 December 2002 in Case C-362/01, *Commission v Ireland*, [2002] ECR I-11433, § 18.

which a climate of trust is essential, but would also hinder the Commission in taking a decision in this file and on the follow-up to these infringement proceedings free from undue outside interference.

In order for the Commission to be able to carry out its tasks and to settle disputes in the framework of infringement proceedings, preferably without having to refer the case to the Court of Justice, this climate of mutual trust between the Commission and the Member State concerned must be ensured throughout the different stages of the procedure until the investigation has been definitively closed. In order to guarantee that the two sides continue to cooperate in good faith and to trust each other it is not possible to disclose the letter of formal notice, also because the Commission may still issue a reasoned opinion based on the exchanges with the United Kingdom, which include the letter of formal notice.

This has been recognised by the Court of Justice in its *LPN* judgment, where it also ruled that a general presumption of non-disclosure of documents in relation to the pre-litigation stage exists:

[I]t 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 1049/2001.³

With this judgment the Court of Justice confirmed the earlier judgment of the Court of First Instance (now: the General Court) in *Petrie* 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*, and that this protection continues up until the delivery of the Court judgment.⁴

Having regard to the above, I consider that public access to the document requested has to be refused, as there is a general presumption that its disclosure would undermine the protection of the objectives of investigation activities protected by Article 4(2), third indent of Regulation 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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 public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that you are *directly affected by the UK Government's policies and cover-ups of child sexual abuse [...]*. You give further information in this regard and explain that *the official collusion and cover-up has been presented to [...] [Parliament's] Petitions Committee three times since 19 March 2014*. However, while I understand that you may have an interest in following the Commission's exchange with the United Kingdom regarding the latter's transposition of

³ 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*, § 65.

⁴ Judgment of 11 December 2001 in Case T-191/99, *David Petrie, Victoria Jane Primhak, David Verzoni and Others v Commission of the European Communities*, § 68.

the EU legislation in question, this constitutes a private interest and can therefore not be considered as an overriding public interest for disclosure. Indeed, as confirmed by the Court of First Instance in its *Sison*⁵ and *Franchet and Byk*⁶ judgments, *the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him and it follows that the applicants' application must be examined in the same way as an application from any other person.*

In any case, I consider that the public interest is better served in this case by ensuring the swift conclusion, in all serenity, of the infringement proceedings and the related exchanges with the Member State, without jeopardising the dialogue between the Commission and the United Kingdom for which, as pointed out above, a climate of trust is essential.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interest in safeguarding the protection of the purpose of investigations protected by Article 4(2) third indent of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the document requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above. Consequently, I have come to the conclusion that the document requested is covered in its entirety by the invoked exception to the right of public access.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the TFEU.

Yours sincerely,



Catherine Day

⁵ Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council* [2005] ECR II-1429, paragraphs 50-55. See also Case C-266/05 P *Sison*, [2007] ECR I-1233, paragraphs 43-48 and judgment of 9 September 2008, Case T-403/05 *MyTravel/Commission*, paragraph 66.

⁶ Joined Cases T-391/03 and T-70/04, [2006] ECR, II-2023, paragraph 82.