



EUROPEAN COMMISSION
Secretariat-General

The Secretary-General

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By registered mail

Ms Maria HEUBUCH
Member of the European Parliament
Rue Wiertz 60-ASP 4F366
B-1047 Brussels

Copy by email:
ask+request-2222-b14581f3@asktheeu.org

**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 2015/4447**

Dear Mrs Heubuch,

I refer to your email of 17 September 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 documents² ('Regulation 1049/2001'). I would like to draw your attention to the fact that as your application for access to documents was submitted under Regulation 1049/2001, it was assessed in the present decision, in the same way as if it would stem from any other citizen. This decision is without prejudice to your privileged access rights as a Member of the European Parliament.

1. SCOPE OF YOUR REQUEST

In your initial application of 17 August 2015, addressed to the Directorate-General for Agriculture and Rural Development (DG AGRI), you requested access to the *Letter of formal notice sent by the Commission to the Italian authorities seeking to adjust a national law on the quality of dairy products concerning the ban of companies from using condensed & powdered milk ingredients in the manufacture of dairy products, as well as the answer from Italian authorities and any other related documents or exchanges of letters and emails.*

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

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

Through its initial reply of 2 September 2015, DG AGRI identified the following categories of documents:

- (1) the complaint and the Commission's correspondence with the complainants;
- (2) the correspondence between the Commission and the Italian authorities in the context of the EU-Pilot 5697/2013 (which precedes the opening of the infringement file 2014/4170), the Letter of Formal Notice of 29 May 2015 and the reply from the Italian authorities of 29 September 2015;
- (3) the Commission's internal documents relating to the file.

Access was refused in full to all three categories of documents, based on the exception of Article 4(2), third indent of Regulation 1049/2001 (protection of the purpose of inspections, investigations and audits).

Through your confirmatory application you request a review of the position of DG AGRI.

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 an independent 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 refusal of DG AGRI, for the reasons set out below.

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.*

The Letter of Formal Notice to which you requested access was drafted as part of the infringement proceedings carried out by the Commission in case 2014/4170 (INF/2014/44170/IT). The infringement proceedings are still ongoing.

In this regard, it should be noted that in its *LPN* judgment the Court of Justice ruled that a general presumption of non-disclosure of documents in relation to ongoing infringement proceedings 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

Similarly, in *ClientEarth* judgment⁴, the General Court ruled that *by analogy with the situation of interested parties in the context of the procedure for the review of State aid, there is a general presumption that disclosure of the documents in the administrative file*

³ Judgment of the Court (Fifth Chamber) in joined cases C-514/11 P and C-605/11 P, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, (ECLI:EU:C:2013:738), paragraph 65.

⁴ Judgment of the General Court in case T-111/11, *ClientEarth v European Commission*, (ECLI:EU:T:2013:482), paragraph 75.

relating to an investigation of a Member State's failure to fulfil obligations would, in principle, undermine protection of the purpose of investigations, and consequently that it was sufficient for the Commission to establish whether that general presumption should apply to all the documents concerned, without it necessarily being required to undertake a specific and individual prior examination of the content of each of those documents. The Court specified that in a situation where, when the decision to refuse access was made, the infringement proceedings were ongoing, the Commission was necessarily required to start from the principle that that general presumption applied to the documents concerned in their entirety.

This reasoning was confirmed by the Court of Justice in the appeal to *Client Earth* judgment⁵ as regards conformity studies which, as is the case for the categories of documents identified above under numbers (1) and (2), relate to the stage of the proceedings preceding the litigation phase (complaint, EU Pilot file, Letter of Formal Notice and reply from the national authorities):

*The Commission was entitled to consider that the full disclosure of the contested studies which, when the express decision was adopted, **had already led it to send a letter of formal notice to a Member State** (n.s.), under the first paragraph of Article 258 TFEU, and had, consequently, been placed in a file relating to the pre-litigation stage of infringement proceedings, would have been likely to disturb the nature and progress of that stage of proceedings, by making more difficult both the process of negotiation between the Commission and the Member State and the pursuit of an amicable agreement whereby the alleged infringement could be brought to an end, without it being necessary to resort to the judicial stage of those proceedings. The Commission was, consequently, justified in considering that such full disclosure would have undermined the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.*

Therefore, disclosure of the documents requested by you, which relate to infringement proceedings for which a letter of formal notice was sent to the Member State, would undermine the purpose of the ongoing infringement procedure 2014/44170/IT, protected by the exception provided for in Article 4(2), the third indent, of Regulation 1049/2001. Indeed, such public disclosure would risk negatively influencing the dialogue between the Commission and the Republic of Italy, for which a climate of mutual trust is essential. This risk is reasonably foreseeable and not purely hypothetical.

In light of the foregoing, the document requested must be refused on the basis of Article 4(2), third indent of Regulation 1049/2001.

⁵ Judgment of the Court (Second Chamber) of 16 July 2015 in Case C-612/13P, *ClientEarth v European Commission*, paragraph 72 [not yet reported].

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions to the right of access provided for in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosing the document concerned. For such an interest to exist, firstly, it has to be a public interest and, secondly, it has to outweigh the interest protected by the exception to the right of access.

The Commission, as guardian of the Treaties, has initiated infringement proceedings against Italy. Public release of the documents requested at this point in time would hinder the successful completion of those infringement proceedings, which, as already mentioned, are still open and ongoing. In this case and at this stage of the proceedings, the public interest is better served by protecting the climate of mutual trust between the Commission and the Italian authorities and preserving the willingness of these authorities to cooperate with the Commission so as to achieve a state of compliance with Union legislation in the framework of the infringement proceeding 2014/4170.

Against this background, I have not been able to identify any public interest that would outweigh the public interest in protecting the purpose of the investigations pursuant to Article 4(2), third indent of Regulation 1049/2001. The fact that the investigations to which the documents relate are of an administrative nature and do not relate to any legislative acts, for which the Court of Justice has acknowledged the existence of wider openness,⁶ provides further support to this conclusion.

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

4. PARTIAL ACCESS

With regard to partial access, it must be noted that the general presumptions recognised by the case law imply that the documents covered by them do not fall within an obligation of disclosure, in full or in part, of their content.⁷ In such a case, therefore, the Commission does not need to consider whether partial access should be granted to the requested documents.

In any event, I have also considered the possibility of granting partial access to the document in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, partial access is not possible considering that the documents requested are covered in their entirety by the exception of Article 4(2), third indent, as explained above.

⁶ Judgment of the Court (Grand Chamber) in case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, EU:C:2010:376, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *Commission v Bavarian Lager*, ECLI:EU:C:2010:378, paragraphs 56-57 and 63.

⁷ Judgment of the Court in case C-404/10 P, *Commission v Odile Jacob*, Case C-404/10 P, EU:C:2012:393, paragraph 133.

5. MEANS OF REDRESS

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 Treaty on the Functioning of the European Union.

Yours sincerely,

A handwritten signature in dark ink, consisting of a series of fluid, overlapping strokes that form a stylized, elongated shape.

Alexander Italianer