



EUROPEAN COMMISSION
DIRECTORATE-GENERAL MIGRATION AND HOME AFFAIRS

Director-General

Brussels,
HOME Ares(2017)

By registered letter with acknowledgment of receipt

Mr Sean McCarthaigh
The Times
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Subject: Your application for access to documents – Ref. GestDem 2017/3995

Dear Mr McCarthaigh,

We refer to your request dated 06/07/2017, registered under the above mentioned GestDem reference number.

In your application, you mentioned that you request access to the documents concerning all correspondence with the Irish government over Ireland's failure to implement Prüm decisions requiring member states to share DNA, fingerprint and vehicle registration data. This concerns an infringement procedure against Ireland for non-compliance with Council Decisions 2008/615/JHA and 2008/616/JHA (Prüm Decisions)¹.

We therefore understand that you request to have access to the letter of formal notice addressed by the European Commission to Ireland on 30 September 2016 and the letter of reasoned opinion addressed by the European Commission to Ireland on 18 May 2017, and respectively to correspondence exchanged between the Irish authorities and the European Commission in relation to this subject in the context of the *infringement case 2016/2093 – Non-compliance with Council Decisions 2008/615/JHA and 2008/616/JHA (Prüm Decisions)*².

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I regret to inform you that your application

¹ Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Article 20(2) of Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA

² http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=20162093&noncom=0&decision_date_from=&decision_date_to=&active_only=0&title=&submit=Search

cannot be granted, as disclosure is prevented by exception to the right of access as 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*".

In particular, the documents which you seek to obtain relate to ongoing investigations regarding possible infringements of EU law, and more specifically, to the failure of Ireland to take the necessary steps to meet the obligations under Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Article 20(2) of Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA.

Disclosure of the requested documents at this point in time would affect the climate of mutual trust between the authorities of Ireland and the Commission, which is required in order to resolve the case possibly without having to refer it to the European Court of Justice.

This interpretation of Article 4(2) in Regulation (EC) No 1049/2001 has been confirmed by the General Court in the *Petrie* judgment³, where it 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 ongoing.

"68.As the Court pointed out in paragraph 63 of its judgment 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 judgment of the Court of Justice.... "

In addition to this, it is to be noted that, in interpreting Article 4 (2), third indent, of Regulation No 1049/2001, the Court of Justice has emphasised the bilateral nature of an administrative procedure between the Commission and the concerned Member State, from which followed the absence of access rights in an administrative procedure between the Commission and the concerned Member States. Indeed, the Court stated in its judgment of 29 June 2010⁴ 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".

For this reason, the Court acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities. Like the procedure for reviewing State aid, infringement proceedings on

³ Case T-29/08 *LPN v Commission*, ECLI:EU:T:2011:448, para. 111.

⁴ Case C-139/07 P *Commission v Technische Glaswerke Ilmenau (TGI)*, ECLI:EU:C:2010:376, para. 58.

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 16 July 2015 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 ongoing⁵.

We have also considered whether partial access could be granted to documents 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 Ireland in order to achieve full compliance by that Member State with the relevant Union legislation.

Moreover, we are of the opinion that the Commission has met at this stage the public's need for information on the infringement proceedings in question with its press releases of 29 September 2016⁶ and 17 May 2017⁷.

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 email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

e –signed

Matthias RUETE

⁵ Judgment of the Court of Justice 16 July 2015 in case C-612/13 P, *ClientEarth v Commission*.

⁶ See Commission press release of 29 September 2016, available at <http://europa.eu/rapid/press-release MEMO-16-3125 en.htm>

⁷ See Commission press release of 17 May 2017, available at <http://europa.eu/rapid/press-release MEMO-17-1280 en.htm?locale=en>