



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels,

Mr Patryk Wachowiec
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BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your request of 20 November 2018 registered under reference GestDem 2018/6115.

Dear Mr Wachowiec,

I refer to your request for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹. Your request concerns all documents sent by the Republic of Poland concerning the measures that the latter has taken or intends to take, following the order of the Court of Justice in Case C-619/18 R².

I regret to inform you that access cannot be granted at this stage, since the requested documents must be protected under the exceptions laid down in the second indent ("*protection of court proceedings*") and third indent ("*protection of the purpose of investigations*") of Article 4(2) of Regulation (EC) No 1049/2001, as will be explained below.

1. EXCEPTION FOR THE PROTECTION OF COURT PROCEEDINGS

Article 4(2) second indent of Regulation (EC) No 1049/2001 states by way of exception that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings [...] unless there is an overriding public interest in disclosure*".

The purpose of this exception is to maintain the independence of the European Union institutions in their dealings with the courts, to protect the integrity of court proceedings

¹ OJ L 145, 31.05.2001, page 43.

² Order of the Court of Justice of 19 October 2018 in Case C-619/18 R - *Commission v Poland*, ECLI:EU:C:2018:852.

and to ensure the proper course of justice. In this regard, the Court of Justice has acknowledged the existence of a general presumption against disclosure of documents pertaining to pending court proceedings.

More specifically, in its judgment in joined Cases C-514/07P, C-528/07P and C-532/07P the Court has stated that the pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently part of the judicial activities of the Court. These activities are as such excluded from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, in the light of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the Court in the Case before it take place in an atmosphere of total serenity³.

Even though the Court has issued an Order in Case C-619/18R, which concerns interim measures, in accordance with Article 163 of the Rules of Procedure of the Court of Justice, *"on application by a party, the order may at any time be varied or cancelled on account of a change in circumstances"*. In light of this, Case C-619/18 R cannot be considered closed. To the contrary, for as long as the main proceedings remain pending, the Order in Case C-619/18 R is subject to changes.

At the same time, the main proceedings for Case C-619/18, concerning the Application of the European Commission against the Republic of Poland⁴, are currently pending before the Court of Justice⁵.

Public disclosure of the documents sent by the Polish authorities to the Commission in conformity with the Order of the Court of Justice in Case C-619/18 R, at this stage, would seriously undermine the ongoing court proceedings in Case C-619/18 by affecting negatively the atmosphere of total serenity in which the exchange of arguments by the parties and the deliberations of the Court shall take place. Furthermore, as indicated above, Case C-619/18 R cannot be considered closed. Therefore, access to the exchange of correspondence between the parties, including the notifications made by Poland pursuant to the Order of the Court of Justice, must be refused as long as both the case for interim measures and the main court proceedings remain pending.

2. EXCEPTION FOR THE PROTECTION OF THE PURPOSE OF INVESTIGATIONS

Article 4(2) third indent of Regulation (EC) No 1049/2001 states by way of exception 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 European Court of Justice construed Article 4(2), third indent of Regulation (EC) No 1049/2001 inter alia in its *LPN* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure⁶. This confirmed the earlier *Petrie* judgment, in which the General Court had held that *"the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This*

³ Judgment of 21 September 2010 in joined cases *Sweden and Others v API and Commission*, C-514/07P, C-528/07P and C-532/07P, ECLI:EU:C:2010:541, paragraphs 77, 79, 92 and 94.

⁴ Action brought on 2 October 2018.

⁵ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-619/18&td=ALL>.

⁶ Judgment of the Court of Justice of 14 November 2013 in joined cases *LPN and Finland v European Commission*, C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738, paragraphs 55 and 65-68.

*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*⁷.

Accordingly, the requested documents, drawn up by the Polish Government in connection with investigations and inspections carried out by the Commission, cannot be disclosed at this stage. The Legal Service considers that the presumption of non-disclosure is applicable, in accordance with the spirit of confidentiality leading the discussions between the Commission and the Republic of Poland, with a view to finding an amicable solution up to the delivery of a judgment concerning the matter.

Please note that, in accordance with the case law of the Court of Justice, the Commission is entitled to refuse access to documents covered by a general presumption, without having to carry out a specific and individual examination of these documents⁸.

Therefore, for as long as the relevant proceedings, i.e. the infringement procedure and the court procedure, remain pending, I consider that the requested documents must remain confidential in accordance with the exceptions for the protection of court proceedings and for the protection of the purpose of investigations.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected under Article 4(2), second and third indent. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused documents that would outweigh the public interest in the protection of the pending court proceedings and investigations.

4. MEANS OF REDRESS

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the address below:

European Commission
Secretary-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 5/282
B-1049 Brussels

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

⁷ Judgment of Court of First Instance (now General Court) of 11 December 2001 in case *Petrie and others v European Commission*, T-191/99, ECLI:EU:T:2001:284, paragraph 68.

⁸ Judgment of 14 July 2016 in case *Sea Handling v Commission*, C-271/15 P, ECLI:EU:C:2016:557, paragraph 69.

The Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Luis Romero Requena', with a stylized, cursive script.

Luis ROMERO REQUENA