



EUROPEAN COMMISSION
SECRETARIAT-GENERAL
The Secretary-General

Brussels,
SG.B.5/MKo/mbp - sg.dsg1.b.5(2013)3443523

Mr. Fred Logue

Sent by email to: [ask+request-693-
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**DECISION BY THE SECRETARY-GENERAL WITHIN THE MEANING OF ARTICLE 4 OF THE
DETAILED RULES FOR THE APPLICATION OF REGULATION (EC) No 1049/2001¹**

**Subject: Confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GestDem 2013/3853**

Dear Mr. Logue,

I refer to your confirmatory application for access to documents in your email of 8 August 2013.

1. SUBJECT OF YOUR APPLICATION

In your initial application of 19 July 2013, you requested access to:

- *"Under the right of access to documents [...], as developed in Regulation 1049/2001 and Regulation 1367/2006, I am requesting [...]: The submission made to the CJEU by Ireland, the Danish government and the Greek government in case C-260/11".*

In its initial reply of 7 August 2013, the Directorate-General Legal Service (hereafter Legal Service) considered that the documents lodged at the Court of Justice in Case C-260/11 by the Irish, the Danish and the Greek governments, acting as interveners did not fall within the scope of Regulation 1049/2001. Consequently, the Legal Service concluded that the requested documents could not be made available to you.

¹ OJ L 345, 29.12.2001, p. 94.

2. POINTS RAISED IN YOUR CONFIRMATORY APPLICATION

In your confirmatory application, you put forward the following arguments:

- Firstly, you allege to submit your initial request under Regulation 1367/2006 and you claim that the Commission wrongly decided to evaluate it under Regulation 1049/2001; which is not correct in light of the content of that request mentioned in point 1;
- In addition, you claim that Regulation 1367/2006 expresses a right to access information which is distinct from the right under Article 15 TFEU and the Commission erred by not reviewing your request under this regulations and therefore its conclusions with regard to Regulation 1049/2001 and Article 15 TFEU were not valid;
- Finally, you stated that since the Court proceedings have been closed now there is no general presumption of inaccessibility and thus the Commission, in your view, must undertake a specific examination of each document requested in accordance with Regulation 1367/2006.

3. ANALYSIS AND CONCLUSIONS

Having examined your application and the documents in question, I came to the conclusion that the initial decision of the Legal Service has to be confirmed. The reasons are set out below.

4. ASSESSMENT UNDER REGULATION (EC) NO 1049/2001 AND UNDER REGULATION 1367/2006 (AARHUS REGULATION)

4.1. In your confirmatory application you claim that your request was made under Regulation 1367/2006 and the Commission wrongly decided to evaluate it under Regulation 1049/2001. In this respect, I would like, firstly, to point out that your request was made "*under the right of access to documents [...], as developed in Regulation 1049/2001 and Regulation 1367/2006*", as indicated above in point 1. Secondly, in its initial reply the Commission came to the conclusion that the requested documents, i.e. , the submissions lodged at the Court by the Irish, the Danish and the Greek governments in case C-260/11 do not fall under the scope of Regulation 1049/2001.

Indeed, Regulation 1049/2001 is based on Article 255 of the Treaty establishing the European Community which has been replaced by article 15 of the Treaty on the Functioning of the European Union (TFUE) with the entry into force of the Treaty of Lisbon on 1 December 2009. Whilst Article 15(3) TFUE extends the right of access to the documents of the Union institutions, bodies, offices and agencies, its fourth paragraph provides that "The Court of Justice of the European Union [...] shall be subject to this paragraph only when exercising [its] administrative tasks".

Therefore, since the requested documents are submissions to the Court when exercising judicial tasks, it is clear that, even after the adaptation of Regulation 1049/2001 to the Treaty of Lisbon, they will not fall under the scope of this Regulation. The Commission itself received a copy of these procedural documents

only in its capacity as intervener in the case at stake, pursuant to Article 23 of the Protocol on the Statute of the Court of Justice and Article 93 of the Rules of Procedure of the Court of Justice².

Furthermore, as the Court has stated in its recent judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P, the Rules of Procedure of EU Courts provide for procedural documents to be served only on the parties to the proceedings [...]. It is clear, therefore, that neither the Statute of the Court of Justice nor the above Rules of Procedure provide for any third-party right of access to pleadings submitted to the Court in court proceedings".

4.2. In your initial and confirmatory application you refer to the provisions of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention.

Indeed, according to Article 3 of Regulation 1367/2006, Regulation 1049/2001 shall apply to any request by an applicant for access to environmental information held by EU institutions and bodies as defined in Article 2.1 c). This shows that the reply based on the scope of application of Regulation 1049/2001 applies equally to a request made under 1367/2006 which refers expressly to Regulation 1049/2001.

Article 2.1 c) of Regulation 1367/2006 states that, for the purpose of this Regulation, "EU institutions or body" means any public institution, body, office or agency established by, or on the basis of the Treaty except when acting in a judicial or legislative capacity. This provision is to be read with Article 3 which refers to the application of Regulation 1049/2001 to any request for access to environmental information to Union institutions and bodies. Thus requests for access to environmental information held by the Court of Justice of the European Union are excluded from the regime for public access to documents governed by Regulation 1049/2001.

The documents you request from the Commission are the submissions lodged at the Court of Justice by the Irish, the Danish and the Greek governments in case C-260/11, a reference for a preliminary ruling concerning the matter of access to justice in environmental matters. As pointed out above, even if the Commission itself received a copy of these procedural documents only in its capacity as intervener in the case at stake, in handling requests for access, it is also bound by Article 2.1 c) and Article 3 of Regulation 1367/2006. If the Commission were to give access to documents held by the Court of Justice, which would not be under the obligation to disclose them pursuant both under Regulation 1049/2001 and Regulation 1367/2006, this would amount to depriving of purpose the clear remits that the co-legislator and the Treaty (Article 15(3) TFUE) intended to set i.e.: restrict the scope of Regulation 1049/2001 and Regulation 1367/2006 only to Union institutions and bodies when not acting in judicial capacity.

In conclusion, Regulation 1049/2001 reads with Regulation 1367/2006 does not apply to your request since the Court of Justice held the requested documents acting in its judicial capacity.

² Available on the Court's web site: http://curia.europa.eu/jcms/jcms/j_6/.

4.3. In the light of the foregoing, I conclude that, pursuant to Article 15(3) TFUE and the Rules of Procedures of the EU Courts, on the one hand, and to Article 2. 1 c) and Article 3 of Regulation 1367/2006, on the other hand, the submissions lodged at the Court by the Irish, the Danish and the Greek governments do not fall within the scope of Regulation 1049/2001.

Furthermore, since Regulation 1367/2006 states that requests for access to documents are governed by Regulation 1049/2001 as adapted to environmental law by Regulation 1367/2006, there are no grounds for objecting that the Legal Service wrongly based its decision on Regulation 1049/2001.

Therefore, since I share the opinion that, for the reasons explained above, the requested documents do not fall either within the scope of Regulation 1049/2001 or under the scope of Regulation 1367/2006, there is no need for an individual assessment of the requested documents.

To this end, I regret to inform you that no access can be granted to the documents at issue.

5. RIGHT OF APPEAL

I would like to draw your attention to your right to appeal against this decision. You may, under Article 263 TFEU, bring proceedings before the European Court of Justice or, under Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Catherine Day', with a stylized flourish at the end.

Catherine Day