Brussels, 6 September 2013

GENERAL SECRETARIAT
European Commission
B-1049 Brussels, Belgium

By email: Sg-Acc-Doc@ec.europa.eu

RE: GestDem 2013/3238 - Confirmatory application for reconsideration of the Commission’s decision to deny ClientEarth’s access to the documents used as basis for discussion in trilogue meetings relating to the adoption of the 7th Environment Action Programme

In conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation"), ClientEarth hereby submits a confirmatory application with regard to the refusal to disclose the remaining requested documents.

The Commission partially disclosed three reports they drafted after trilogue meetings and withheld "GRI fiches" used within the Commission in view of the meeting on inter-institutional relation group on the topic as well as the three four column tables enshrining the positions of the European Parliament and Council on the Commission's proposal.

On the partial access to reports prepared after each trilogue meetings

(1) In addition to keep the substantial information confidential, some of the information provided is not clear enough. The three reports drafted by the Commission after trilogue meetings use acronyms which cannot always be understood even by people used to work with EU institutions. The reports mention some priority objectives to achieve, "priority objectives from 1 to 4" without specifying what they are. The reports also states that ""CNL" Secretariat and EP confirmed their agreement on a long list of other points" without specifying what they are. This is not understandable.

(2) The documents contain environmental information which is thus subject to the Aarhus Convention and Regulation 1367/2006. Article 5 of the Aarhus Convention provides that "each party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent". Providing information that is not understandable and clear and that as a result cannot be used by the public is not providing access in a transparent way. Article 5 of Regulation 1367/2006 titled "quality of the environmental information" also provides that the information must be up-to-date, accurate and comparable. Although the clarity of the information is not mentioned in this
provision, it is implicit that the environmental information provided must be of quality and comprehensible.

(3) Moreover, the detailed discussion that took place between the Council, the European Parliament and the Commission during the trilogue meetings that is kept confidential by the Commission is precisely what the public should have access to. The Commission does not provide any solid explanation as to how disclosing the positions of the different institutions would seriously undermine the decision-making process.

(4) The process leading to the adoption of the Decision on the 7th EAP is a legislative process. Article 12 (2) of Regulation 1049/2001, stresses the fact that "legislative documents" should be made directly accessible through the public registers.

(5) In Cases C-39/05 and C-52/05, the Court draws from recital 2 and 6 of the Regulation's preamble to conclude that "openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.

It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regard as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for Member States should be made directly accessible."

(6) This is confirmed by Article 4 of Regulation 1367/2006 in environmental matters.

(7) The Commission must therefore act openly and transparently within these trilogue meetings in which the three institutions decide what EU law will provide.

(8) The trilogue procedure is not provided by the EU Treaties and is kept completely confidential. It is now commonplace and increasingly occurs before the EP has held a plenary vote on the piece of legislation, as it is the case for the adoption of the 7th EAP. Indeed, although the Parliament has not adopted its first reading position officially, the Council and the European Parliament have agreed on a final draft (see attached). It seems that the text has been agreed upon and that only formalities still need to be accomplished. The political process seems to be concluded. Yet, Article 1, 6(1) and 11 TEU and 15 TFEU as well as Article 42 of the Charter of Fundamental Rights and Freedoms make clear that the institutions must act openly and transparently and as closely as possible to the citizens.

---

(9) It is therefore not clear to what stage of the decision-making process the Commission refers to in its reply to justify not disclosing the reports as the content of the discussions between the three institutions within legislative processes must be provided while the process is ongoing to allow transparency and public participation. Disclosing the information once the law is adopted or the Decision in this case is not complying with either the Aarhus Convention, Regulation 1367/2006 or Regulation 1049/2001 as interpreted by the EU courts.

(10) It is common practice at national level in democratic states that the adoption of laws is discussed in public. The position of each institution is publicly debated. There is no reason justifying a difference at EU institutional level. On the contrary, EU directives and regulations apply to 28 Member States, their adoption should therefore be subject to full transparency and openness.

(11) Also, there seems to be a contradiction in the Commission’s argumentation that uses paragraph 2 of Article 4(3) which provides that documents may be kept confidential even after the decision has been taken but justifies confidentiality by the fact that the process is not yet concluded.

**On the confidentiality of the three four-column tables**

(12) The same arguments apply to the decision to withhold the tables enshrining the positions of the European Parliament and of the Council. What the Commission considers as “external pressure” is in fact democratic debate and the obligation to act transparently in accordance with the provisions of the EU Treaties mentioned above. The positions of the Council and of the European Parliament on the proposal of the Commission simply cannot be kept confidential. These two institutions are public institutions acting within a legislative process. The European Parliament is acting in the name of the citizens who elected its members who are accountable to them. The Council is composed of the governments of each Member States which are also accountable to the citizens of the EU. These discussions may not take place behind closed doors.

(13) The Commission did not demonstrate how the decision-making process would be seriously undermined by the disclosure of the tables and has therefore breached its duty to duly motivate its decision as provided by Article 296 TFEU.

(14) Even if the decision-making process would be undermined, there would anyway be an overriding public interest in disclosure of the documents for the reasons set out above.

**On the confidentiality of the "GRI fiches"**

(15) The public must know what policy options the Commission considers and privileges when discussing a decision. This is also a precondition for the public to understand what
considerations underpin EU legislative acts as required by the Court in Turco. Moreover, the Commission does not demonstrate how disclosure of the GRI fiches would undermine the effectiveness of its action in future negotiations with the Council and the Parliament. In any events, the Commission could have partially disclosed the fiches in case some information should have remained confidential. Withholding the whole documents is disproportionate and in breach of Article 4(3) of Regulation 1049/2001.

(16) For all these reasons, ClientEarth hereby requests that the Commission grants full access to the requested documents.

Yours sincerely,