



## EUROPEAN COMMISSION

Brussels, 6.2.2019  
C(2019) 1026 final

OUT OF SCOPE

Spain

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001**

**Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/6293, 2018/6294 and 2018/6295.**

Dear [REDACTED],

I refer to your e-mail dated 26 December 2018, registered on 27 December 2018, in which you submitted a confirmatory application in accordance 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<sup>1</sup> (hereafter ‘Regulation (EC) No 1049/2001’).

**1. SCOPE OF YOUR APPLICATION**

On 28 November 2018, you made three different applications for access to documents, in which you requested the following:

- ‘infringement procedure ref. 2012/2100 [...]’ (registered under reference number GESTDEM 2018/6293);
- ‘infringement procedure ref. 2016/2134 [...]’ (registered under reference number GESTDEM 2018/6294);
- ‘infringement procedure ref. 2017/2100 [...]’ (registered under reference number GESTDEM 2018/6295).

As you did not indicate the specific document(s) to which you were requesting access, the Directorate-General for Environment, which dealt with the request at the initial stage,

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<sup>1</sup> Official Journal L 145 of 31.5.2001, p. 43.

concluded that you referred to the entire set of documents covered by all the concerned infringement procedures.

In its initial reply of 13 December 2018, the Directorate-General for Environment refused access to the documents in question, based on the exception of Article 4(2), third indent of the Regulation (EC) No 1049/2001 (protection of the purpose of inspections, investigations and audits).

In your confirmatory application, you narrowed down the scope of your request by asking for the partial release of the ‘documents containing the lists (3) of those Spanish localities that had failed to fulfil its obligations under Directive 91/271/EEC<sup>2</sup>, and are part of three ongoing investigations of EU law (IP 2012/2100; 2016/2134 and 2017/2100).’ Consequently, the scope of your confirmatory application has been limited to these documents.

You support your request with the arguments that I address in the sections below.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the relevant Directorate-General at the initial stage.

Following this review, I wish to inform you that I confirm the decision of the Directorate-General for Environment to refuse access to the documents, based on the exception of Article 4(2), third indent of Regulation (EC) No 1049/2001 (protection of the purpose of inspections, investigations and audits), for the reasons set out below.

The documents to which you request access concern the procedure laid down in Article 258 of the Treaty on the Functioning of the European Union, which consists of two consecutive stages, the administrative pre-litigation stage and the judicial stage before the Court of Justice. The purpose of the pre-litigation procedure is to allow the Member State to put an end to any alleged infringement, to enable it to exercise its rights of defence and to define the subject matter of the dispute with a view to bringing an action before the Court.<sup>3</sup>

The three infringement procedures (IP 2012/2100, IP 2016/2134 and IP 2017/2100) relate to Spain’s alleged breach of the obligations on urban wastewater collection and treatment, as set out in the Directive (EEC) No 271/1991, and are currently in their pre-litigation stage. The documents to which you requested access are part of the administrative files related to these infringement procedures.

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<sup>2</sup> Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, Official Journal L 135, 30.5.1991, p. 40–52.

<sup>3</sup> Judgment of the Court of Justice of 10 December 2002, *Commission v Ireland*, C-362/01, EU:C:2002:739, paragraphs 15 and 16.

Article 4(2), third indent of Regulation (EC) No 1049/2001 provides that the ‘institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits’.

The Court of Justice acknowledged, among other things, in its *Liga para a Protecção da Natureza* judgment, that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure.<sup>4</sup> This confirmed earlier case law in which the Court of First Instance (now the ‘General Court’) ruled that ‘the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure’.<sup>5</sup>

Consequently, all the documents in the infringement file to which you request access are covered by a general presumption of non-disclosure, based on the exception of Article 4(2), third indent of Regulation (EC) No 1049/2001.

The public disclosure of these documents would not only negatively influence the dialogue between the European Commission and the Member State, for which a climate of trust is essential, but would also alter the strictly bilateral nature of the infringement procedure as provided for in Article 258 of the Treaty on the Functioning of the European Union. Such disclosure would consequently adversely affect the European Commission’s investigations, as it would undermine the climate of mutual trust required to resolve disputes between the European Commission and the Member State without having to use the judicial phase of the infringement procedure. It would have a negative effect on the extent to which the European Commission can conduct negotiations with the Member State with the objective that the Member State complies voluntarily with European Union law.

Having regard to the above, I consider that the use of the exception under Article 4(2), third indent of Regulation (EC) No 1049/2001 on the grounds of protecting the purpose of inspections, investigations and audits is justified and that access to the documents in question must be refused on that basis.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

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<sup>4</sup> Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza and Finland v Commission*, Joint Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55 and 65-68.

<sup>5</sup> Judgment of the Court of First Instance of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

In your confirmatory application, you argue that there is an overriding public interest in disclosure because it would allow EU citizens to be better informed about the consequences of living in the relevant Spanish agglomerations that are failing to meet EU standards. You conclude that ‘the alleged infringements of EU law are not less important than the health of the citizens who live or even walk near or close to those places’.

In this respect, I note that such general considerations cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the documents in question.<sup>6</sup> The Court of Justice also ruled that general assertions that the disclosure of the documents is necessary for the protection of human health, without stating specific grounds showing to what extent such disclosure would serve that general interest, do not represent an overriding public interest justifying disclosure of the documents.<sup>7</sup>

Consequently, I consider that the interests on which you rely do not demonstrate a pressing need for the disclosure of the documents requested or that they prevail over the reasons justifying the refusal to disclose the documents in question.

Nor have I been able, based on the elements at my disposal, to establish the existence of any overriding public interest in the disclosure of the documents in question. In any case, I consider that the public interest is better served in this case by ensuring the conclusion of the procedure and the related exchanges with Spain, without jeopardising the dialogue between the European Commission and Spain for which, as pointed out above, a climate of trust is essential.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness<sup>8</sup>, provides further support to this conclusion.

#### **4. NO PARTIAL ACCESS**

I have also examined the possibility of granting partial access to the relevant documents, in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, it follows from the assessment made above that the documents that fall within the scope of your request are manifestly and entirely covered by the exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001.

It must also be underlined that the Court of Justice confirmed that a presumption of non-disclosure excludes the possibility of granting partial access to the file.<sup>9</sup>

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<sup>6</sup> Judgment in *Liga para a Protecção da Natureza and Finland v Commission*, cited above, paragraph 93.

<sup>7</sup> Judgment of the Court of Justice of 11 May 2017, *Sweden and Spirlea v Commission*, C-562/14, ECLI:EU:C:2017:356, paragraphs 57-58.

<sup>8</sup> Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376, paragraph 60.

<sup>9</sup> Judgment of the General Court of 25 March 2015, *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93.

## **5. MEANS OF REDRESS**

Finally, 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,



*For the Commission*  
*Martin SELMAYR*  
*Secretary-General*