



EUROPEAN COMMISSION

Brussels, 27.9.2019
C(2019) 7109 final

████████████████████
████████████████████
E-28005 Madrid
Spain

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/3702**

Dear ██████████,

I refer to your letter of 31 July 2019, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 27 June 2019, addressed to the Directorate-General for Environment, you requested access to 'the communications between Spanish authorities and the European Commission related to the situation of Mar Menor [...] and the compliance of the Water Framework Directive in relation with the level of nitrates in the aquifer'.

In its initial reply of 9 July 2019, Directorate-General for Environment refused access to the requested documents based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

In your confirmatory application, you request a review of this position. You support your request with additional arguments, which I will address, to the extent necessary, in the corresponding 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 Directorate-General concerned at the initial stage.

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

2.1. Protection of the purpose of inspections, investigations and audits

As a preliminary note, I would like to point out that the documents to which your request of access concern as pertaining to the administrative file conducted by the Commission regarding an infringement procedure against Spain for failure to fulfil obligations under EU law, registered under reference no. 2018/2250, concerning the implementation by Spain of Directive 91/676/EEC, on the protection of waters against pollution caused by nitrates from agricultural sources. The European Commission considers infringement procedures as a form of investigation.

Pursuant to Article 258 of the Treaty on the Functioning of the European Union, such infringement procedures follow a sequence of two procedural stages: the administrative pre-litigation stage, whose purpose is to induce the Member State concerned to comply voluntarily with EU requirements, 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 Court³, and the judicial stage, which is conducted before the Court if the previous stage is not ended successfully. Infringement procedure no 2018/2250 is still in the pre-litigation stage, and the Commission has not yet taken a decision on the follow-up of this file.

The exercise of the right of access to the Commission documents, enshrined in Article 15(3) of the Treaty on the Functioning of the European Union, is governed by the rules and principles set out in Regulation (EC) No 1049/2001. I would like to stress that the provisions of the Council of Europe Convention on Access to Official Documents or the Resolutions of the Spanish Council on Transparency and Good Governance you refer to in your confirmatory application are not part of the EU legislative body and, therefore, not relevant in the handling of your request.

³ Judgment of the Court of Justice of 10 December 2002, *Commission v Ireland*, C-362/01, EU:C:2002:739.

As a general principle, the Regulation grants the public the widest possible access to the documents held by the institutions to fulfil the goals of securing a more significant role for citizens in the decision-making process, ensuring that the administration acts with greater propriety, efficiency and responsibility and strengthening the principles of democracy and respect for fundamental rights. Notwithstanding this, the Regulation also provides for limitations to the right of access that are meant to protect higher public interests. The third indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits’.

The exceptions to the right to access to documents are to be interpreted and applied restrictively so as not to impede the application of the general principle of giving the public the widest possible access to documents held by the institutions. However, the Court of Justice has established a general presumption of non-disclosure applicable to documents pertaining to ongoing infringement procedures under Article 258 of the Treaty on the Functioning of the European Union: ‘[c]onsequently, [...] all the documents, irrespective of whether they had been drawn up during the informal stage of that procedure, that is to say before the Commission sent the letter of formal notice to the Member State concerned, or during the formal stage thereof, that is to say after that letter was sent, were regarded as being covered by that presumption’.⁴

The Court has held, in particular, in its judgment in *Spirlea v Commission* that granting access to those documents is utterly incompatible with a proper handling of the procedures, and likely to jeopardise their desired outcome, which is the voluntary compliance by the Member State⁵.

The Court of Justice ruled that, ‘documents relating to an infringement procedure during the pre-litigation stage may be covered by the general presumption of confidentiality [because] “it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001”’.⁶

The Court of Justice further noted that, ‘[...] the Member States are entitled to expect the European 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

⁴ Judgment of the Court of Justice of 11 May 2017, *Sweden v. Commission*, C-562/14 P, EU:C:2017:356, paragraph 41.

⁵ Judgment of the General Court of 25 September 2014, *Spirlea v. Commission*, T-306/12, EU:T:2014:816, paragraph 57.

⁶ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C- 514/11 P and C- 605/11 P EU:C:2013:738, paragraph 65.

during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access [...] on the ground of protection of the public interest relating to inspections, investigations and court proceedings. [...]’.⁷

Therefore, the disclosure of the requested document at this stage of the procedure would essentially deprive the Spanish authorities from their lawful expectation of sincere cooperation on the part of the European Commission during the infringement procedure. Refusal of access to the requested document is therefore based on Article 4(2), third indent (protection of the purpose of the investigations), of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 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.

In your confirmatory application, you invoke the transparency towards the citizens as an overriding public interest that would justify the disclosure.

In that regard, I would like to refer to clarifications provided by the Court of First Instance in its judgment in *Turco v Council*, where the Court has held explicitly that the overriding public interest capable of justifying the disclosure of a document covered by this exception must, as a rule, be distinct from the principles of transparency, openness and democracy or of participation in the decision-making process.⁸ The reason is that those principles are effectively implemented by the provisions of Regulation (EC) No 1049/2001 as a whole. If those same principles are indeed invoked, the applicant should, at the very least, provide sufficient arguments showing why, having regard to the specific facts of the case, that invocation is so pressing that it overrides the need to protect the document in question.

That is not, however, the case here. I note that the interests on which you rely are just general considerations that do not demonstrate a pressing need for the disclosure of the documents requested or that cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the documents in question. Neither have I been able, based on the elements at my disposal, to establish the existence of any other public interest in the disclosure of the documents in question that would override the real and non-hypothetical harm that such disclosure would do to the ongoing investigation.

⁷ 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.

⁸ Judgment of the Court of First Instance of 23 November 2004, *Maurizio Turco v Council of the European Union*, T-84/03, EU:T:2004:339, paragraphs 81-83.

It follows that the prevailing interest in this instance is the protection of the purpose of the ongoing infringement procedure. Against this background, I take the view that the public interest is better served by ensuring the swift conclusion, in all serenity and cooperation, of infringement procedure no. 2018/2250, without jeopardising the dialogue between the Commission and Spain for which, as pointed out above, a climate of mutual trust is essential. As explained above, you do not put forward any evidence capable of calling into question the validity of the finding that all the documents forming part of the investigation concerning infringement procedure no. 2018/2250 are covered by the general presumption of non-disclosure resulting from the exception provided in Article 4(2), third indent, of Regulation (EC) No 1049/2001 with a view of protecting the purpose of inspections, investigations and audits.

Therefore, I consider that the public interest is better served in this case by ensuring the conclusion, in all serenity, of the infringement investigation, without jeopardising the dialogue between the European Commission and the Member State for which, as pointed out above, a climate of trust is essential.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

However, as stated by the Court of Justice, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part.⁹

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European 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



⁹ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.