



EUROPEAN COMMISSION

LEGAL SERVICE
The Director-General

Brussels, 23rd July 2021

By e-mail

Mrs Päivi Leino-Sandberg
University of Helsinki
PL 4 (Yliopistonkatu 3)
FI-00014 Helsingin yliopisto
Finland

ask+request-9188-5ccd3870@asktheeu.org

Subject: Request for access to documents

Ref.: Your request of 12 March 2021 registered on 15 March 2021 under reference GestDem 2021/1560.

Dear Mrs Leino-Sandberg,

I refer to your application above-mentioned by which you request, under Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents,¹ a copy of “*documents which contain the analysis of the Commission Legal Service concerning the EU's compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which has been repeatedly questioned by its monitoring bodies*”.

1. IDENTIFICATION OF THE DOCUMENTS

In response to your request, the Legal Service has identified the following documents matching the terms of your request:

1. Note of the Legal Service of 22 February 2008 for the attention of Mr P. Carl, Director-General of DG ENV [document reference Ares(2015)5156891].
2. Note of the Legal Service of 27 February 2008 for the attention of Mrs Pia Bucella, Director of DG ENV [document reference Ares(2015)5157745].
3. Note of the Legal Service of 27 June 2012 for the attention of Mr Romero Requena, Director-General of the Legal Service [document reference Ares(2012)776625].

¹ Official Journal L145, 31.05.2001, page 43.

4. Note of the Legal Service of 29 January 2013 for the attention of the Directors-General of DG CLIMA, DG AGRI, DG ENTR, DG ENV, DG SANCO, DG MOVE and DG ENER [document reference Ares(2013)132146].
5. Note of the Legal Service of 27 May 2015 for the attention of Mr Romero Requena, Director-General of the Legal Service [document reference Ares(2015)2200028].
6. Note of the Legal Service of 4 June 2020 for the attention of Mr Daniel Calleja Crespo, Director-General of DG ENV [document reference Ares(2020)2895997];
 - 6.1. Attached to the note is the draft Proposal for a Regulation containing the comments of the Legal Service in the form of track-changes.

2. ASSESSMENT OF THE DOCUMENTS

After a concrete assessment of the documents identified, I regret to inform you that access cannot be granted since they must be protected in their entirety under the exception provided for in Article 4(2), second indent, ("*protection of legal advice*"). Documents 1 and 2 are also covered by the exception for the "*protection of court proceedings*", laid down in the second indent of Article 4(2). Finally, documents 2, 6 and 6.1 are, in addition, covered by the exception provided for in the first subparagraph of Article 4(3) ("*protection of the decision-making process*") of Regulation (EC) No 1049/2001.

The refused documents are legal opinions drafted by the Legal Service, which contain the service's assessment and interpretation of the Convention on access to information, public participation in decision-making and access to justice in environmental matters² (the "*Aarhus Convention*") and the Regulation (EC) No 1367/2006 (the "*Aarhus Regulation*")³. As it will be explained below, they deal in particular with certain highly sensitive issues and were intended for other Commission's services, in particular Directorate-General for Environment (DG ENV) and for the Director-General of the Legal Service.

3. REASONS FOR REFUSAL

3.1 Protection of court proceedings and legal advice

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 and legal advice [...], unless there is an overriding public interest in disclosure*".

Firstly, I consider that disclosure of the documents requested would undermine the protection of legal advice, which, as recognised by the Court of Justice, represents an exception that must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice⁴. Disclosure would make known to the public sensitive internal opinions, drafted under the responsibility of the Legal Service and intended for the Commission's services dealing with the implementation of the Aarhus Convention in the European Union (EU) and for the Director-General of the Legal Service. They contain legal advice on different sensitive questions which remain, at present, controversial, some of them being still discussed either in the framework of ongoing legislative procedures or in that of pending judicial proceedings.

² Link of the Convention: [cep43e.pdf \(unece.org\)](https://unece.org/ref/cep43e.pdf)

³ 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 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

⁴ Judgment of the Court of Justice of 1 July 2008, Joined Cases C-39/05P and C-52/05P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, ECLI:EU:C:2008:374, paragraph 42.

Indeed, document 1 reveals the Commission's practice regarding the representation of the EU in procedures before the Aarhus Convention Compliance Committee (the "ACCC") established pursuant to Article 15 of the Aarhus Convention in general and, more particularly, with respect to procedures involving the European Investment Bank (EIB) and the question of its status as a public authority within the meaning of the Aarhus Convention. It contains the assessment of the Legal Service of the legal aspects and implications of the institutional arrangements followed to represent the EU at the international level and must remain confidential.

Document 2 contains the position of the Legal Service on the question of the applicability of Title IV of the Aarhus Regulation to decisions on co-financing adopted by the Commission under EU legislation on regional policy and on the issue of the applicability of the Aarhus Convention and the Aarhus Regulation to Euratom law. This issue remains highly controversial, on the one hand, since it has been raised by Member States within the framework of the pending legislative proposal to amend the Regulation⁵ and, on the other hand, due to the fact that case law has not yet decided this issue definitively⁶. Moreover, the question is also linked to proceedings pending before the ACCC and the Court of Justice, as it will be explained below.

Document 3 sums up the views of the different teams of the Legal Service and the other Directorate Generals concerning both the issue of the disclosure of the information laid down in Article 4(4)(d) of the Aarhus Convention (information relating to "*business secrets*"), and the problematic notion of "*emissions into the environment*" according to Article 6 of the Aarhus Regulation. As indicated below regarding document 4, these issues are still controversial and subject of discussion.

Document 4 contains not only the position defended by the Commission in Case T-545/11⁷, in which a request for access to documents based on Regulation (EC) No 1049/2001 and on Aarhus Regulation was at stake, but also several other arguments concerning the implications for the EU institutions of granting access to environmental information concerning emissions into the environment.

More specifically, this document contains also the Commission's position regarding the notion of "*emissions into the environment*" and its interaction with many other provisions of EU secondary law, which, so far, were never discussed in Court, as well as the relevance thereof for possible future replies to access requests. In this vein, although Case T-545/11 is now closed, the document reveals arguments and interpretations that have not been made public by the judgment, because they relate to other areas of EU law and are still, at present, the subject of discussion. In particular, this holds true as regards the balance in each of these different areas to be found between protection of the environment and health on the one hand, and protection of business secrets on the other. It follows that the note forms part and parcel of the legal advice provided by the Legal Service to the institution. Accordingly, in this document, the Legal Service does not confine itself to explaining the position defended by the Commission in Case T-545/11.

⁵ Commission Proposal COM(2020)642 final of 14 October 2020.

⁶ See in this regard the judgment of the General Court of 27 February 2018, Case T-307/16, *CEE Bankwatch Network v Commission*, ECLI:EU:T:2018:97, paras. 39 and ff ; Judgment of the Court of Justice of 29 July 2019, Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres*, ECLI:EU:C:2019:622; Judgment of the Court of Justice of 22 September 2020, Case C-594/18P, *Republic of Austria v Commission*, ECLI:EU:C:2020:742.

⁷ Judgment of the General Court of 8 October 2013, Case T-545/11, *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v Commission*, ECLI:EU:T:2013:523.

Document 5 contains the Legal Service's assessment both on sensitive and highly political issues. In particular, the note addresses several options, such as the question of establishing a new horizontal and sectorial legislative instrument, which is an option still under discussion. In addition, it addresses the issue of the management of infringement proceedings on access to justice, which is a question relevant to the exercise by the institution of its own discretion in implementing its role as guardian of the Treaties.

Document 6 is the response of the Legal Service to the inter-service consultation launched by DG ENV on the proposal for a regulation amending Aarhus Regulation. This proposal is the subject of ongoing discussions on very sensitive issues, which are at the level of the first reading, and contains in particular the arguments of the Legal Service on the modifications to be made to the Aarhus Regulation. These discussions will certainly be followed by a political repositioning of the Commission.

Annex 6.1 contains the Legal Service's comments and modifications to the proposal for a regulation in the form of track-changes. Among other issues, the comments contain an assessment of the extent to which the proposed modification of the Regulation can ensure conformity with the conclusions of the ACCC, in particular regarding the concept of "*administrative act*". These comments must be protected under the exception relating to the protection of legal advice.

Disclosing the internal legal assessment contained in the refused documents would clearly have, in a foreseeable manner, a serious impact on the Commission's interest in seeking and receiving legal advice and on the Legal Service's capacity to assist the Commission and its services in the assessment of this highly sensitive matters. The frankness, objectivity and comprehensiveness of the legal advice would be seriously affected if legal advice on highly sensitive subjects, as in the present case, would be disclosed, depriving thus the Commission of an essential element in the framework of its work.

In addition, I consider that disclosure of documents 1 and 2 would also undermine the protection of pending court proceedings. Indeed, they are linked to ongoing proceedings before the Aarhus Convention Compliance Committee (ACCC) and also to pending Joined Cases C-212/21P and C-223/21P⁸, which concern the Aarhus Convention and the balance between compliance with international obligations and respect of primary law. It should also be added that document 2 touches on the concept of administrative decisions, a notion that is relevant in the ongoing appeal before the Court of Justice.

The purpose of the exception for the protection of court proceedings is to maintain the independence of the European Union institutions in their dealings with a Court as well as to ensure the proper course of justice and a fair hearing for the parties.

In its judgment in T-796/14 the General Court has confirmed that the scope of the exception relating to the protection of court proceedings covers not only the documents drawn up solely for the purposes of specific court proceedings, such as pleadings. The scope of that exception also covers documents, whose disclosure is liable, in the context of specific proceedings, to compromise the Commission's defensive position and the principle of equality of arms, which is a corollary of the very concept of a fair trial, provided that they have a relevant link with the pending proceedings⁹.

⁸ Cases C-223/21 P, *Commission v ClientEarth* and C-212/21 P, *European Investment Bank v ClientEarth* (pending).

⁹ Judgment of the General Court of 15 September 2016 in Case T-796/14, *Philip Morris Ltd v European Commission*, ECLI:EU:T:2016:483, paragraphs 76 and 88.

As pointed out above, the legal questions discussed in the documents requested are now the subject matter of proceedings before the Court of Justice. Consequently, I consider that public disclosure, at this stage, of the documents 1 and 2 would seriously undermine the proper course of justice and the integrity of the pending court proceedings by affecting negatively the atmosphere of total serenity in which the exchange of arguments by the parties and the deliberations shall take place.

In the light of the foregoing, I consider that the refused documents are covered by the exception provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001 (*“protection of court proceedings and legal advice”*) and cannot be made public.

3.2 Protection of the decision-making process

In accordance with Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 *“[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure”*.

As point out above, the issues assessed in documents 2, 6 and 6.1 are being considered in the context of the new legislative procedure regarding the amendment of the Aarhus Regulation. This procedure is still ongoing between the co-legislators and raises many delicate and difficult questions which remain, at present, controversial, in particular, the notion of binding and external legal effects of administrative acts and the applicability to the Euratom Treaty of the Aarhus acquis as well as the concepts of "national implementing measures" and internal control provided for by the Aarhus Regulation. Depending on the negotiations on the particular issues, the Commission may indeed have to adapt its position. For these reasons, the likelihood of the interests in the protection of legal advice and in the decision-making process being compromised is not hypothetical.

Furthermore, while the legislative proposal is still being discussed, disclosure would undermine the pending decision-making process and could also prejudice the legislative process itself. Putting in the public domain such considerations of the Commission's Legal Service before any decision is adopted by the Union legislature would severely affect the capacity of the Commission to take decisions after frank and unbiased internal discussions free from external interferences, thus seriously affecting its decision-making process.

Therefore, the requested documents must be protected under the exception relating to the protection of decision-making process and cannot be disclosed.

4. POSSIBILITY OF GRANTING PARTIAL ACCESS

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, after careful examination, I have come to the conclusion that they are entirely covered by the exceptions invoked so that a partial disclosure cannot be granted without harming the protected interests.

5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) and (3) of that Regulation, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. 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 indent, and Article (3), first subparagraph, of Regulation (EC) No 1049/2001.

In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of documents requested that would outweigh the public interest in the protection the court proceedings and legal advice, as well as the institution's decision-making processes.

6. 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 Secretariat-General of the Commission at the following address:

European Commission

Secretariat-General

Unit C.1. *"Transparency, Document Management & Access to Documents"*

BERL 7/076

B-1049 Brussels

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

Yours sincerely,

[*signed electronically*]
Daniel CALLEJA CRESPO