



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B.5/MKü/ASH/psi – sg.dsg1.b.5(2012)160646

Ms Kersti Wissenbach

E-mail: ask+request-21-383ceee@asktheeu.org

Subject: Confirmatory application for access to a document under Regulation 1049/2001 - Gestdem 2011/5894

Dear Ms Wissenbach,

I refer to your e-mail of 27 December 2011, in which you lodge a confirmatory application, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereafter: Regulation 1049/2001).

1. SCOPE OF YOUR REQUEST

In your confirmatory application you request a review of the position taken by the Director-General for Home Affairs (hereafter: DG HOME) on 21 December 2011, in reply to your initial application of 18 November 2011.

In this initial application, you requested access to the "*legal assessments carried out before the decision to launch the infringement proceedings against the member states which have not successfully transformed the Data Retention Directive (2006/24/EC), Sweden, Czech Republic, Germany and Romania*". Furthermore, you request access to "*all documents related to these infringement proceedings, including the written correspondence with the four mentioned Member States*".

DG HOME has refused access to the documents. In your confirmatory application of 27 December 2011, you maintain your initial application.

2. EXAMINATION AND CONCLUSIONS

Having examined your request, I have identified the documents listed in Annex I of this reply as falling under the scope of your request. These documents are all part of the four Commission infringement files concerning the supposed failure to implement Directive

¹ OJ L145, 31.05.2001, p. 43.

2006/24/EC² (the "Data Retention Directive"), regarding the Czech Republic (infringement procedure 2011/1143), Germany (infringement procedure 2011/2091), Romania (infringement procedure 2011/2089) and Sweden (infringement procedure 2007/1181). Among these documents, the following are translations of judgments, which are as such in the public domain and can therefore be disclosed (see the attachments):

- Unofficial translation of the judgment of the Constitutional Court of Romania of 08.10.2009
- Translation of the judgment of the Constitutional Court of the Czech Republic of 22 March 2011

For the remaining documents (hereafter: "the requested documents"), I have come to the conclusion that the initial refusal by DG HOME has to be confirmed for the reasons set out below.

3. PROTECTION OF THE PURPOSE OF INVESTIGATIONS

Article 4(2), third indent, of Regulation 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".

You request access to all documents of the four aforementioned infringement cases. These infringement investigations are ongoing; the Commission has not yet adopted any final decision.

The requested documents contain information which plays a key role in evaluating whether the four Member States have complied with their obligations under EU law.

The procedure laid down in Article 258 TFEU comprises two consecutive stages, the pre-litigation stage of an administrative nature and the judicial stage before the Court. The purpose of the pre-litigation procedure laid down in Article 258 TFEU is to allow the Member State to put an end to any 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 Court³.

In these circumstances, early disclosure of the documents you request will certainly adversely affect the dialogue between the Member States authorities and the Commission. In order for the Commission to be able to carry out its tasks and to settle this dispute, preferably without having to refer it to the Court of Justice, there has to be a climate of mutual trust between the Commission and the Member States concerned, throughout the different stages of the procedure until the case has been definitively closed.

This interpretation has been confirmed by the Court of First Instance, in particular at paragraph 68 of the *Petrie* judgment⁴:

² Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, p. 54

³ Judgment of 10 December 2002 in Case C-362/01, *Commission v Ireland*, [2002] ECR I-11433, paragraph 18.

⁴ Judgment of 11 December 2001 in the case T-191/99, [2001] ECR II-3677.

"68. [...] *As the Court pointed out in paragraph 63 of its judgement in WWF (cited above in paragraph 59), the Member States are entitled to expect the 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 during the court proceedings and up to the delivery of the judgement of the Court of Justice. [...]*"

In addition to this, it is to be noted that in interpreting Article 4 (2), third indent, of Regulation No 1049/2001 the Court of Justice⁵ has emphasised the absence of access rights in an administrative procedure between the Commission and the concerned Member State. Indeed, the Court stated in paragraph 58 of its judgment in the aforementioned *TGI* case that "*the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file. Account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001. If those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question*". For this reason, the Court acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities⁶. As in a procedure for reviewing State aid, infringement proceedings on the basis of Article 258 TFEU are of a bilateral nature in which the Commission's position is only addressed to the Member State concerned.

In a recent judgement, the General Court acknowledged the existence of a general presumption that disclosure of documents in infringement proceedings in principle undermines protection of the objectives of investigation activities, as long as these proceedings are ongoing.⁷

It follows from the above that access to the requested documents must be refused on the basis of the exception related to the protection of the purpose of investigations, provided for in Article 4(2), third indent, of Regulation 1049/2001.

4. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the requested documents, in accordance with Article 4(6) of Regulation No 1049/2001. However, partial access is not possible given the fact that the requested documents are, at this stage of the infringement procedure, entirely covered by the exception under Article 4(2), third indent of Regulation 1049/2001.

⁵ Judgment of 29 June 2010 in the case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-05885, hereafter: the *TGI* case.

⁶ Cf. paragraph 61.

⁷ Judgment of 9 September 2011 in Case T-29/08, *LPN v Commission*, not yet reported.

procedure, entirely covered by the exception under Article 4(2), third indent of Regulation 1049/2001.

5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), third indent of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interest protected by virtue of Article 4(2), third indent of Regulation 1049/2001.

In your confirmatory application, you consider that there is a strong public interest in access to the requested documents because of the vigorous public debate about a possible violation of the right to privacy by the Data Retention Directive. You explain that this question is raised not only by civil society, but also by government officials, information and privacy commissioners and constitutional courts across Europe. In your view, the public needs detailed information about how the Directive is implemented, including as much information as possible about how Member States are being threatened with court proceedings for non-compliance. You add that retention of telecommunication traffic constitutes a massive restriction of the right to privacy and that possible sanctions for not implementing the Directive would have to be paid from taxpayers' money.

I observe that your reasoning largely aims at questioning whether the Data Retention Directive is an appropriate legal instrument, and compatible with higher-ranking legal principles. However, I must underline that an infringement procedure is an administrative procedure, which does not address the question of the appropriateness of the Directive as such. Indeed, the Directive has been adopted by the Legislator of the Union, a decision which is binding for the Commission and which can only be overturned by the European Court of Justice. Instead, the Commission's task in the infringement procedure is to verify whether Member States have implemented the Directive correctly. In the framework of this procedure, the Commission can indeed, if it deems it appropriate, bring the matter before the Court of Justice, under Article 258 TFEU.

In this context, I draw your attention to paragraph 60 of the judgement in the aforementioned *TGI* case, where the Court confirmed that in administrative matters, such as the ones at stake, the public interest in transparency does not carry the same weight as in legislative matters.

Additionally, it has to be taken into account that public disclosure of the discussions with Member States, particularly in a case that is subject to vigorous debate as you mention, would inevitably lead to an immobilisation of the respective positions. This would in turn harm the aim of the current investigation, that is, to find a settlement of the dispute leading to compliance with EU law.

Therefore, I consider that in this particular case, the prevailing interest is the public interest in protecting the integrity of this investigation as well as the climate of mutual trust between the Commission and the Member States authorities, which are necessary for achieving the purpose of the investigation concerned.

Consequently, I consider that, in the present case, there is no public interest that would outweigh the interest protected by the exception of Article 4(2), third indent of Regulation 1049/2001.

6. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

A handwritten signature in black ink that reads "Catherine Day". The signature is written in a cursive style with a large, looped initial 'C' and a checkmark-like flourish at the end.

Catherine Day

Attachments (3)