



EUROPEAN COMMISSION

Brussels, 18.1.2019  
C(2019) 592 final

  
  
**OUT OF SCOPE**  
  
  


**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION No 1049/2001<sup>1</sup>**

**Subject:       Your confirmatory application for access to documents under  
Regulation No 1049/2001 - GESTDEM 2018/5390**

Dear Mr ,

I refer to your letter of 7 December 2018, 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 documents<sup>2</sup> (hereafter 'Regulation No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application, you requested access to all documents relating to two infringement files:

- infringement file number 2015/2200 regarding the compatibility of Spanish procedural law with Directive 93/13/EEC on unfair contract terms, and a possible breach of Article 47 of the EU Charter of Fundamental Rights;
- infringement file number 2017/4004 regarding the compatibility of Spanish rules on State liability for a breach of EU law due to the Spanish legislature with the principles of equivalence and effectiveness.

This confirmatory decision refers to the latter part of your request, which was attributed to the Legal Service of the European Commission at initial level.

---

<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

In its initial reply of 21 November 2018, the Legal Service refused access to the documents in question, based on the exception of Article 4(2), third indent of Regulation No 1049/2001 (protection of the purpose of inspections, investigations and audits).

In your confirmatory application, you request a review of the initial reply. In particular, you request access to the infringement file in question and to all the documents which gave rise to the infringement proceedings and the documents generated therein ('[...] y me conceda acceso al expediente de infracción 2017/4004, mediante la facilitación de copia del mismo, así como de las actuaciones y documentos que hayan originado dicho expediente y de los documentos que traigan cause del mismo'). You put forward detailed arguments, which I will address below.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION NO 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 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 the Legal Service of the European Commission and refuse access to the documents forming part of the infringement proceedings in case 2017/4004 based on the exception defined in Article 4(2), third indent (protection of purpose of investigations), for the reasons set out below.

The documents to which you request access form part of 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>

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

Contrary to what you argue in your confirmatory application, even if Regulation No 1049/2001 does not expressly foresee an exception to the right of access to documents during ongoing infringement proceedings, in several judgements the Court of Justice interpreted Article 4(2) third indent with regard to infringement proceedings.

---

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

Furthermore, the Court has interpreted Article 4(2), third indent of Regulation No 1049/2001 *inter alia* in its *LPN* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure applied to the documents concerned in their entirety.<sup>4</sup> This confirmed the Court's earlier *Petrie* judgment, in which it ruled that '[...] 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 judgment of the Court of Justice'.<sup>5</sup> Also, in the *ClientEarth* case, the General Court stated that 'the exception relating to the protection of the purpose of investigations does not apply solely to documents relating to infringement proceedings which have been commenced but also to documents concerning investigations the outcome of which might be such proceedings'.<sup>6</sup>

Consequently, all documents in the infringement file are covered by a general presumption of non-accessibility based on the exception of Article 4(2), third indent of Regulation No 1049/2001. This means that the institution is not required to carry out a specific and individual assessment of the content of each requested document.

In your specific case, the requested documents relate to infringement procedure 2015/4004, which has neither reached the stage of a ruling of the Court of Justice nor been closed by the European Commission, and is, therefore, still ongoing. In these proceedings, the European Commission has sent a letter of formal notice and a reasoned opinion to the Spanish authorities.

Public disclosure of the requested documents would negatively influence the dialogue between the Commission and the Kingdom of Spain, for which a climate of trust is essential. This climate of mutual trust between the Commission and the Member States concerned must be ensured throughout the different stages of the procedure until the investigation is definitively closed. Disclosure of the requested documents at this stage would be incompatible with that aim.

Contrary to what you allege, the use of the exception in this case reflects a strict interpretation of the exceptions of Regulation No 1049/2001. Furthermore, contrary to what you argue in your confirmatory application, the reasoning of the European Commission

---

<sup>4</sup> Judgment of 14 November 2013, *LPN and Finland v Commission*, Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, 65-68.

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

<sup>6</sup> Judgment of 13 September 2013, *ClientEarth v European Commission*, T-111/11, EU:T:2013:482, paragraph 80.

does not violate Article 15, paragraphs 1 and 3 of the Treaty on the Functioning of the European Union referring to the general principle of transparency and openness which guides the work of the institutions. Article 15 paragraph 3 does not grant the right to an unlimited access to documents. Indeed, the Union legislator is empowered to lay down the principles and limits governing access to documents, notably through Regulation No 1049/2001.

You also argue that the considerations put forward by the European Commission infringe the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights, rendering applicants defenceless as the latter are not allowed to bring forward contradictory arguments.

I note however that, in your confirmatory application, you do not bring forward any elements explaining how the European Commission is denying you access to an effective remedy. Please note in this respect that the means of review and redress available to applicants are, by way of standard practice, mentioned at the end of every initial and confirmatory decision, as was the case in the initial reply to your application, and is the case in this confirmatory decision.

Furthermore, it is also the European Commission's general practice to address, in each confirmatory decision, the various issues raised by an applicant in his/her confirmatory application.

Having regard to the above, I consider that the use of the exception under Article 4(2), third indent of Regulation 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. NO PARTIAL ACCESS**

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation No 1049/2001. However, it follows from the assessment made above that the documents which 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 No 1049/2001.

It must also be underlined that the Court of Justice has confirmed that a presumption of non-disclosure excludes the possibility to grant partial access to the file.<sup>7</sup>

Consequently, partial access is not possible considering that the documents requested are covered in their entirety by the invoked exception to the right of public access.

---

<sup>7</sup> Judgment of 25 March 2015, *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93.

#### 4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation No 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 in this case outweigh the interests protected by virtue of the third indent of Article 4(2) of Regulation No 1049/2001.

In your confirmatory application you invoke an alleged public interest linked to the importance of citizens' involvement in situations that are contrary to European Union law. Furthermore, you argue that as a practising lawyer in the area of consumers rights law, and as an applicant who lodged a complaint regarding certain aspects covered by infringement procedure 2017/4004, you would be in a position to bring new elements to the European Commission in relation to an alleged violation of European consumer law by Spain, which is relevant for the claim of State liability for breach of EU law. In the case in hand it is European consumer law.

The role of citizens is certainly very important in detecting infringements of European Union law, as is reflected in the corresponding procedures established by the European Commission which enable citizens to draw the former's attention to possible infringements. However, the involvement of citizens and their role in detecting infringements does not require access of complainants to documents exchanged in ongoing infringement cases.

Furthermore, in the *Association Justice & Environment* judgment, the Court held that 'general considerations relating to the principle of transparency and the right of the public to be informed of the work of the institutions cannot justify the disclosure of documents relating to the pre-litigation stage of infringement procedures, as the Commission [...] ensures that the public is informed about the progress of specific infringement cases through the regular publication of press releases'.<sup>8</sup>

Therefore, I note that the considerations in your confirmatory application are of a general nature and cannot provide an appropriate basis for establishing that any possible overriding interest would prevail over the reasons justifying the refusal to disclose the documents in question.<sup>9</sup> Indeed, 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. Such general considerations are therefore not capable of demonstrating that the principles of

---

<sup>8</sup> Judgment of the General Court of 23 January 2017, *Association Justice & Environment v European Commission*, T-727/15, EU:T:2017:18, paragraph 60.

<sup>9</sup> Judgment in *LPN and Finland v Commission*, cited above, EU:C:2013:738, paragraph 93.

transparency and democracy raised in this case are of a particularly pressing nature that would prevail over the reasons justifying the refusal to disclose the requested documents.

Furthermore, in order to address your second concern, I note that recently the General Court confirmed again that the right of access to documents does not depend on the nature of the particular interest which the applicant for access may or may not have in obtaining the information requested.<sup>10</sup>

Consequently, I consider that in this case there is no overriding public interest in disclosure that would outweigh the public interest in safeguarding the protection of the purpose of investigations protected by Article 4(2), third indent of Regulation No 1049/2001. In addition, I consider that in this specific case, the public interest is better served by protecting the atmosphere of mutual trust between the Commission and the Member States involved in the infringement proceedings.

## **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 European Commission*  
*Martin SELMAYR*  
*Secretary-General*

---

<sup>10</sup> Judgment of the General Court 27 November 2018, *VG v Commission*, joined cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 55.