

Decision in case 1747/2018/FP on the European Commission's refusal to grant access to documents relating to a legislative amendment

Decision

Case 1747/2018/FP - Opened on 15/10/2018 - Decision on 28/11/2018 - Institution concerned European Commission (Settled by the institution) |

The case concerned the European Commission's refusal to grant an animal rights NGO public access to documents relating to the calculations performed to estimate animal use for a draft impact assessment accompanying the draft Regulation amending the REACH Regulation.

The Commission refused access to the documents on the grounds that disclosure would seriously undermine the protection of its decision-making process.

In the course of the inquiry, the Ombudsman proposed that the European Commission should reassess the complainants' request for public access and, when doing so, take due account of a recent ruling of the Court of Justice regarding access to documents related to legislative initiatives **[1]** .

The Ombudsman proposed to the Commission that public access to the documents should be granted. The Ombudsman was informed by the parties that the documents were released in the course of the inquiry and therefore the Ombudsman closed the case.

[1] Judgment of the European Court of Justice of 4 September 2018, ClientEarth v Commission, Case C-57/16 P, ECLI:EU:C:2018:660.

Background to the complaint

1. The Commission is currently preparing a proposal for the amendment of Regulation 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH).

2. PETA (People for the Ethical Treatment of Animals) is a non-governmental organisation for



the protection of animal rights. On 6 April 2018, PETA asked the Commission to give it public access to the documents containing the calculations performed to estimate animal use for the draft impact assessment 'Revision of REACH Annexes for substances with nanoforms - Elements under Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, consideration'.

3. On 6 June 2018, the Commission refused to grant public access to the documents on the grounds that disclosure would seriously undermine protection of the decision-making process, under Article 4(3) first subparagraph of Regulation 1049/2001 [1] .

4. On 25 June 2018, PETA filed a request for review (a so-called “confirmatory application”).

5. The Commission extended the deadline for responding to the request for review on two occasions, on 13 July and on 6 August 2018. The complainant then sent an email to the Commission stating that the Commission’s failure to reply to the request for review would be considered as a refusal unless the Commission responded by 24 August 2018.

6. The Commission did not provide a response to the request for review, so PETA turned to the Ombudsman on 5 October 2018.

The inquiry

7. The Ombudsman opened an inquiry into the European Commission’s refusal to grant public access to the documents containing the calculations performed to estimate animal use for the draft impact assessment, 'Revision of REACH Annexes for substances with nanoforms - Elements under Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, consideration'.

Arguments presented by the parties

Commission’s arguments

8. The Commission claimed that the requested documents were part of the internal deliberations and consultation within the Commission and their disclosure would seriously undermine the Commission’s decision-making process. On that basis, and after concluding that the complainant did not establish an overriding public interest, the Commission refused access to the requested documents, citing Article 4(3) first subparagraph of Regulation 1049/2001.

9. However, it informed the complainant that the final Impact Assessment report will be made publicly available once the Commission Regulation amending Regulation 1907/2006 is adopted.



Complainant's arguments

10. The complainant asserted that the REACH Regulation concerns issues of significant public interest. According to the complainant, the animal calculations estimate the number of animals that would be used in different regulatory scenarios. It stated that the Commission failed to provide sufficient information in the impact assessment on the estimated figures and numbers of animals that would be used. Therefore, the Commission's views on what those figures and numbers mean cannot be verified.

11. In addition to this, the complainant noted that it discussed the draft Regulation with several representatives of the Member States and concluded that they have various interpretations of the impact of the draft regulation on animal use. The complainant attached to its complaint email correspondence with the UK and Germany as an example of differences in understanding. Thus, it noted, animal use for the purpose of REACH can be fully understood only after the calculations are made publicly available and thus verified and reviewed before the adoption of the Regulation. Considering the short timeframe before the proposed regulation is adopted, the complainant considered that the requested documents should be made publicly available as soon as possible.

12. Therefore, the complainant argued in favour of strengthening democracy through openness, accountability and citizens' right to scrutinise all information on which legislative acts are based. It considered that the Commission failed to conduct a transparent consultation process with the stakeholders.

13. The complainant claimed that “ *the documents it [the Commission] prepares and develops in the context of the legislative process are precisely the basis for the legislative actions with which citizens are entitled to acquaint themselves*” and that therefore “ *no general presumption of confidentiality applies to such impact assessments and associated documents*”. In its reasoning the complainant referred to the judgments in the cases *ClientEarth v Commission* [2] and *Turco* [3], as well as to the Advocate-General Bot's statement [4]. The complainant considered that according to Recital 6 of Regulation 1049/2001 “ *such documents should be made directly accessible to the greatest possible extent*”. In that regard, the complainant argued that the disclosure of the documents in question can be refused only if their disclosure would have a “ *substantial impact on the decision-making process*” and stated that the risk of undermining the protected interest has to be reasonably foreseeable and not purely hypothetical, which, according to the complainant, the Commission failed to establish.

The Ombudsman's assessment

14. The Ombudsman emphasised the urgency of the present case. The complainant wished to have access to the requested documents to allow it to participate fully in the democratic debate regarding the content of proposed legislation. In light of the failure of the Commission to issue a confirmatory decision in due time, the Ombudsman considered it appropriate to make a proposal for a solution immediately.



15. The Ombudsman noted that the Commission's initial decisions seemed to imply that the Commission considered that there exists a general presumption that access can be denied to the requested documents (because disclosure might seriously undermine the institution's decision-making process).

16. The Ombudsman noted, however, that the very recent case law of the Court of Justice (from September 2018) has now established that documents that relate to impact assessments regarding proposed legislation do not fall under a general presumption of nondisclosure [5] . Any refusal of access to a document, or parts of a document, must be supported by reasoning which shows that granting access would specifically undermine an interest protected in Article 4 of Regulation 1049/2001.

17. The EU Courts have established that the disclosure of those documents is likely to increase the transparency and openness of the legislative process as a whole, and, thus, to enhance the democratic nature of the European Union by enabling its citizens to scrutinise that information and to attempt to influence that process [6] .

18. The Ombudsman thus proposed that the European Commission should issue its decision on the request for review by 5 November 2018 at the latest and, when doing so, should take due account of the recent ruling of the Court of Justice regarding access to documents related to legislative initiatives [7] and the public interest arguments made by the complainant.

The Ombudsman's assessment after the proposal for a solution

19. The European Commission has informed the Ombudsman that it released the documents to the complainant during the course of the Ombudsman's inquiry, in fact on the day before it received the Ombudsman's solution proposal.

20. In addition, the complainant has informed the Ombudsman that, after receiving the documents it contacted the Commission to ask for further clarifications. The Commission promptly provided the complainant with all the relevant information. The complainant then confirmed that it considered its complaint concerning public access to be resolved.

21. The Ombudsman notes that the Commission's decision in the present case reinforces the legitimacy of the legislative process and enhances transparency and democracy in the European Union. The Ombudsman welcomes the Commission's constructive approach to resolving the matter and responding positively and promptly to the complainant's request for clarification about the content of the documents, once they had been released.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion :

The Ombudsman closes the case as settled by the European Commission.



The complainant and the European Commission will be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 28/11/2018

[1] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1>.

[2] Judgment of the European Court of Justice of 4 September 2018, *ClientEarth v Commission*, Case C-57/16 P, ECLI:EU:C:2018:660.

[3] Judgment of the European Court of Justice of 1st July 2008, *Sweden and Turco*, Joined Cases C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374.

[4] Advocate General Bot, Case C-57/16 P, *ClientEarth v Commission*.

[5] *ClientEarth v Commission*, Paragraph 109.

[6] *ClientEarth v Commission*, paragraph 94.

[7] Judgment of the European Court of Justice of 4 September 2018, *ClientEarth v Commission*, Case C-57/16 P, ECLI:EU:C:2018:660.