

Decision in case 1404/2019/FP on how the European Commission dealt with a request for public access to a letter of formal notice concerning an infringement procedure against France on the non-compliance with the transposition of Directive 2003/4/EC on public access to environmental information

Decision

Case 1404/2019/FP - Opened on 25/07/2019 - Decision on 04/10/2019 - Institution concerned European Commission (No maladministration found) |

The case concerned the refusal of the European Commission to grant the complainant public access to the Commission's letter of formal notice in an infringement proceeding against France.

In the course of her inquiry, the Ombudsman found that the Commission's decision was in line with the applicable rules on access to documents. The Ombudsman thus concluded that there was no maladministration on the part of the Commission and closed the case.

Background to the complaint

1. On 24 January 2019, the Commission sent a letter of formal notice to France, concerning the conformity of national measures transposing the provisions of Directive 2003/4/EC [1] on public access to environmental information.

2. Under the Directive, citizens are entitled to access to environmental information and national public bodies that hold that information have a duty to make it available. The European Commission called on France to bring its domestic law into line with EU standards on public access to environmental information. The Commission was concerned that French law in this area may be overly restrictive, failing to give appropriate public access to information that the Directive defines as environmental information. According to the Commission, the French law might also be unclear about the conditions under which public access may be refused.

3. On 26 January 2019, the complainant asked the Commission to give him public access to a copy of the abovementioned letter of formal notice.



4. On 14 February 2019, the Commission refused public access to the requested document because, it argued, disclosure would undermine the protection of the purpose of inspections, investigations and audits.

5. On 20 February 2019, the complainant asked the Commission to review its refusal to grant public access to the document (by a so-called “ *confirmatory application*”).

6. On 25 March 2019, the Commission confirmed its refusal to grant access to the document.

7. On 20 July 2019, the complainant turned to the Ombudsman.

The inquiry

8. The Ombudsman opened an inquiry into the Commission’s refusal to grant public access to the letter of formal notice addressed to the French authorities.

9. In the course of the inquiry, the Ombudsman reviewed the requested document.

Arguments presented to the Ombudsman

The complainant’s arguments

10. The complainant argues that there is an overriding public interest in the release of this document since the document concerns a potential breach of the Directive on access to environmental information.

11. The complainant refers to the “Aarhus Convention” [2] and indicates that because the requested document concerns “ *environmental information*”, as defined in the Convention, no exception can prevent its disclosure.

12. The complainant states that he is responsible for an internet site which aims at providing legal information to citizens and contributing to the public debate concerning issues of public interest, such as access to information related to the environment. In this context, the requested document would, he claims, contribute to the public debate on access to environmental information.

The European Commission’s arguments

13. The Commission explained that the document requested by the complainant is part of the administrative file on an ongoing infringement procedure, as laid down in Article 258 of the Treaty on the Functioning of the European Union.

14. The Commission argued that providing access to the requested document would undermine



the protection of the purpose of inspections, investigations and audits. [3] It explained that public disclosure of the requested document would negatively influence the dialogue between the European Commission and France, for which a climate of trust is essential. It stressed that this climate of mutual trust between the European Commission and France must be ensured throughout the different stages of the procedure, at least until the investigation is definitively closed. In the Commission's opinion, disclosure of the requested documents at this stage would be incompatible with that aim.

15. The Commission stressed that the objective of an amicable settlement between the Commission and a Member States justifies the refusal of access to the letter of formal notice. [4] The Commission referred to the EU case law that reaffirms that the disclosure of documents relating to an infringement procedure is likely to alter the nature and process of such procedure and could therefore be detrimental to the negotiation process. [5]

16. As regards whether there was an overriding interest in disclosure of the letter, the Commission took the view that the document does not contain 'environmental information' within the meaning of the Aarhus Convention and the public interest was better served by protecting the purpose of the ongoing investigation.

The Ombudsman's assessment

17. An infringement procedure consists of two stages, an administrative pre-litigation stage and a judicial stage before the Court of Justice. One of the aims of the pre-litigation stage is to give the Member State concerned the chance to resolve any alleged infringement amicably. If this is achieved the Commission will close the case. Such an outcome is in the public interest because it means that EU law will be properly applied in the Member State concerned, without the need to bring the issue to court (which would be time-consuming and costly for all parties.) In order to try and achieve such an amicable settlement, it is important to foster and maintain a degree of mutual trust.

18. The Ombudsman recognises that the EU courts have ruled that public access to documents related to an **on-going** infringement procedure can undermine the necessary 'climate of mutual trust' between the Commission and the Member State. [6]

19. In this inquiry, the Ombudsman has reviewed the requested document and confirmed that it relates to an infringement procedure. The Commission has confirmed that the infringement procedure is still ongoing, as it was when the Commission made its confirmatory decision on 25 March 2019.

20. The Ombudsman notes that the complainant has argued that there is an overriding public interest in disclosing the document since, in his interpretation, it contains 'environmental information' for which there is an overriding public interest in disclosure.

21. As regards this argument, the Ombudsman agrees with the Commission that the document



does not itself include 'environmental information'. The content concerns the question whether France has adopted an appropriate regime for granting public access to environmental information, but it is not information about or affecting the environment. Therefore it is not environmental information as such.

22. The Ombudsman recognises the apparent anomaly inherent in a case which concerns the lack of transparency in a procedure which is addressing the alleged shortcomings of a regime which should ensure appropriate public access to information. Nevertheless, she accepts that there are no factors in the present circumstances which indicate the existence of an overriding public interest of disclosure of the requested document. She considers that, at this stage of the procedure, the public interest is better served by allowing the infringement procedure to be completed and that the disclosure of the document, at this stage, would undermine that process. She also notes that the complainant can make a new access to documents request once the infringement procedure in question is closed.

Conclusion

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

There was no maladministration by the European Commission in refusing access to the requested document.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 04/10/2019

[1] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC <https://eur-lex.europa.eu/eli/dir/2003/4/oj> [Link] .

[2] Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark, on 25 June 1998.

[3] See Article 4(2) third indent, of Regulation 1049/2001.

[4] Judgment of the Court of 11 December 2001 in case T-191/992, *Petrie et autres v.*



Commission, paragraph 68, available at:

<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=61715C6B70D0500D57718561C2544A98?text=&docid=46940&p>
[Link].

[5] Judgment of the Court of 14 November 2013 in joint cases C-514/11 P and C-605/11 P, *Liga para a Protecção da Natureza (LPN) and Finland v. the European Commission*, paragraph 63, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0514&from=FR>.

[6] Joined Cases C-514/11 P and C-605/11 P, *LPN and Republic of Finland v European*

Commission, paragraphs 65-68.