

The European Commission's refusal to give public access to documents concerning the energy consumption and greenhouse gas emissions of the ceramics industry reported under the EU's emissions trading system

Case opened

Case 2000/2022/PVV - **Opened on** 15/11/2022 - **Decision on** 19/12/2023 - **Institution concerned** European Commission (Maladministration found) |

Head of Unit - C2

Secretariat-General

European Commission

Dear Mr X,

The Ombudsman has received a complaint against the European Commission.

The complaint concerns the Commission's refusal to give the complainant public access to documents concerning the EU Emissions Trading Scheme and the sectoral benchmark related to the performance of installations in the ceramics industry.

Specifically, the Commission identified 25 documents as falling within the scope of the complainant's access request. It disclosed one document but refused to give access to (i) 23 notifications from EU Member States and (ii) a list of the best 10% benchmark installations. In refusing access, the Commission relied on an exception under Article 4 of Regulation 1049/2001, arguing that disclosure would undermine the commercial interests of the installations concerned.

The complainant challenges the Commission's position that the commercial information contained in the documents is sensitive. It also argues that there is an overriding public interest in disclosure, both in light of the Aarhus Regulation [1] and in light of the ongoing review of the BREF CER [2]. In addition, the complainant is concerned that the Commission failed to identify



any email exchanges it had with Member State authorities on the matter based on its view that these do not constitute documents under its documents registration rules.

We have decided to open an inquiry into the complaint against the Commission's decision to refuse access under Regulation 1049/2001 and the Commission's failure to identify all documents falling within the scope of the complainant's access request.

Regulation 1049/2001 states that applications for access should be handled promptly. It is in line with this principle that the Ombudsman also seeks to deal with cases such as this as quickly as possible.

As a first step, we consider it necessary **to review the documents at issue in the complainant's access request**. We would be grateful if the Commission could provide us with copies of the 24 documents to which it refused to give access, preferably in electronic format through encrypted e-mail, [3] by **22 November 2022**.

The documents subject to the public access request will be treated confidentially, along with any other material the Commission chooses to share with us that it marks confidential. Documents of this kind will be handled and stored in line with this confidential status and will be deleted from the Ombudsman's files shortly after the inquiry has ended.

In addition, we consider it useful to review the following documents:

In its confirmatory response to the complainant, the Commission referred to the General Court's ruling in *Rogesa*, saying that this case law applied by analogy as the case concerned similar documents. In light of this, we would ask the Commission, if possible, to provide us with a sample of **the documents at issue in that case** (namely, graphs showing the quantity of CO2 emissions per tonne of product produced by the steel manufacturing plants concerned).

Given that the complainant challenges the Commission's view that the **email exchanges it had with Member State authorities** (and which it mentions on page 9 of its confirmatory response to the complainant) do not constitute documents under its documents registration rules, we would also ask to review those emails.

We would be grateful to receive copies of these additional documents together with the Commission's reply to the complaint (see below).

The Commission's position has been set out in its confirmatory response dated 10 August 2022. However, should the Commission wish to provide additional views, to be taken into account by the Ombudsman during this inquiry, we would be grateful if they could be provided to us within fifteen working days from the receipt of this letter, that is, by **6 December 2022**. In particular, we note that, despite the General Court's endorsement of the Commission's refusal to give access in *Rogesa*, the Commission later decided to disclose the documents at issue in that case. Given that the Commission bases its refusal in this case partly on that ruling, we would appreciate it if the Commission could explain the reasons for its decision to disclose the



documents to the applicant even though the court had not annulled its confirmatory decision.

The inquiries officer responsible for the case, Ms Michaela Gehring.

Yours sincerely,

Rosita Hickey Director of Inquiries

Strasbourg, 15/11/2022

[1] Regulation 1367/2006 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:

<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32006R1367> [Link].

[2] See: <https://eippcb.jrc.ec.europa.eu/reference/ceramic-manufacturing-industry> [Link].

[3] Encrypted emails can be sent to our dedicated mailbox.