

Decision in case 1506/2014/JAS on the European Commission's handling of a request for public access to a document concerning infringement proceedings against the UK in relation to the treatment of waste water

Decision

Case 1506/2014/JAS - Opened on 10/10/2014 - Decision on 17/09/2015 - Institution concerned European Commission (No maladministration found) |

The complainant is a citizen of the United Kingdom who is concerned about whether the sewage treatment plant at Whitburn (UK) complies with the Urban Waste Water Treatment Directive. He complained to the Ombudsman about the European Commission's refusal to grant him public access to a document related to infringement proceedings regarding the United Kingdom's application of the Directive, namely a letter sent by the UK authorities to the Commission in the course of infringement proceedings.

The Commission refused to release the document, arguing that documents relating to ongoing infringement proceedings are covered by a general presumption of non-disclosure. Nevertheless, the Commission provided the complainant with a summary of the document in question.

The Ombudsman inquired into the issue and found that the Commission was justified in refusing to release the document. Therefore, the Ombudsman concluded that there was no maladministration by the Commission.

The background to the complaint

1. The case concerned the European Commission's handling of a request for public access to documents related to infringement proceedings as regards the United Kingdom's ('UK') application of the Urban Waste Water Treatment Directive [1] .

2. In October 2012, the Court of Justice of the European Union ('Court') held in Case C-301/10 that the UK was in breach of the Urban Waste Water Treatment Directive. [2] The Commission subsequently initiated infringement proceedings under Article 260 of the Treaty on the Functioning of the European Union (TFEU) as regards the implementation of this judgment.



3. In April 2014, the complainant requested access to documents relating to the pre-litigation phase ('documents 1-3') of the procedure that led to the October 2012 judgment of the Court and to a document relating to the infringement proceedings pursuant to Article 260 TFEU following the October 2012 judgment ('document 4').

4. The Commission granted partial access to documents 1-3, deleting only those parts related to other infringement cases and the names of UK officials.

5. The Commission, however, refused access to the fourth document, identified as "*Letter of 31 March 2014 from the UK authorities addressed to the Secretary-General of the European Commission*". Nevertheless, the Commission provided the complainant with a summary of the document requested, explaining the follow-up planned by the UK authorities for the implementation of the October 2012 Court judgment.

6. In June 2014, the complainant lodged an appeal (referred to as a "confirmatory application") requesting access to document 4.

7. In July 2014, the Commission sent its decision on the confirmatory application to the complainant in which it maintained the view it had taken in the original decision.

8. On 28 August 2014, the complainant complained to the Ombudsman concerning the Commission's refusal to release document 4.

The inquiry

9. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

Allegation:

The Commission wrongly failed to grant public access to a document relating to infringement proceedings against the UK in regard to the Urban Waste Water Directive.

Claim:

The Commission should grant public access to the document.

10. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.



Allegation that the Commission wrongly failed to grant public access to the document

Arguments presented to the Ombudsman

11. In its decision on the confirmatory application, the Commission concluded that the refusal to grant access to the document was justified by Article 4(2), third indent, of Regulation 1049/2001 [3] and that there is no overriding public interest in disclosure [4] .

12. The Commission noted that the document is part of its ongoing investigation under Article 260 TFEU on how the UK will implement the judgment of the Court in Case C-301/10 and more generally which actions the UK takes to comply with the Urban Waste Water Directive. The dialogue with the Member State is still fully ongoing. According to the Commission, public disclosure of the document would not only negatively influence this dialogue for which a climate of trust is essential, but would also hinder the Commission in defining the line to take in this file free from undue outside interference.

13. The Commission argued, therefore, that in line with the relevant case-law, there is a general presumption that the disclosure of the document would undermine the protection of the purpose of the investigation activities as protected by Article 4(2), third indent, of Regulation 1049/2001.

14. However, the Commission remarked, it provided the complainant with a summary of the document requested, which explains the follow-up planned by the UK authorities for the implementation of the judgment, and that it had communicated regularly with the complainant in order to provide him with as much information as legally possible.

15. Regarding the existence of an overriding public interest in disclosure, the Commission was of the opinion that the disclosure of the document would not benefit the Commission's investigative capacity and thus would not serve the public interest in this context. The public interest would be better served, in this case, by ensuring that the ongoing investigation was completed as quickly as possible and without any undue external pressure from third parties.

16. In his confirmatory application, the complainant claimed that there was " *no basis* " to argue that the purpose of the investigation would be undermined " *other than if we have evidence which contradicts what* [the requested document] *says* ". He claimed that it would be in the public interest for the document to be published so that he and other citizens living close to the site, as well as other experts, can analyse and scrutinize its content. Questioning whether the evidence placed before the Court during case C-301/10 was correct, the complainant stated that it is in the public interest that the requested document be released.

The Ombudsman's assessment



Preliminary Remarks

17. The Ombudsman acknowledges the efforts by the complainant in supporting the EU authorities in their work. Without the assistance of such engaged citizens, the EU authorities would be significantly hampered in their efforts to ensure that the public interest is served. This would be the case, in particular, as regards the protection of the environment where citizens, with detailed local knowledge, are of particular importance. The Ombudsman would also like to acknowledge the efforts of the Commission in cooperating with engaged citizens, making the EU public administration more open and transparent. This case is a very good example of how the Commission can engage with concerned citizens and organisations for the benefit of all.

Assessment

18. In refusing access to the requested document, the Commission relied on Article 4(2), third indent, of Regulation 1049/2001, which provides that:

" The institutions shall refuse access to a document where disclosure would undermine the purpose of inspections, investigations and audits unless there is an overriding public interest in disclosure ."

19. The Ombudsman notes that, according to established case-law, the exceptions to public access to documents must be interpreted and applied strictly, so as not to frustrate the application of the general principle that the public should be given the *widest possible access to documents* held by the institutions. [5]

20. According to the case-law, a three-stage examination has to be made in order to determine if an exception to access under Regulation 1049/2001 applies. [6]

21. First, it has to be determined whether the requested document *falls within a category* covered by the invoked exception to access in Article 4 of Regulation 1049/2001. In the present case, the Commission relied on the need to protect the purpose of investigations, audits or inspections. The Ombudsman notes that the document is a reply from the UK authorities to a letter sent by the Commission in the context of a Commission investigation to determine if the UK has complied with a judgment of the European Court of Justice that found that the UK was not in compliance with EU environmental law. It is thus clear that the document falls within the scope of the concept of *investigations* , within the meaning of the third indent of Article 4(2) of Regulation 1049/2001.

22. Second, it has to be determined whether disclosure of the document concerned would undermine that protected interest, namely whether disclosure would undermine the purpose of the investigation. The purpose of the investigation is to ensure that the UK brings itself into compliance with EU law.

23. In its decision to refuse access, the Commission relied on the general presumption that



disclosure would undermine the protection of the investigations, protected by Article 4(2), third indent, of Regulation 1049/2001.

24. In its case-law, the Court has recognised certain types of documents as documents benefiting from a general presumption of confidentiality, [7] among them the documents concerning an infringement procedure under to Article 258 TFEU during its pre-litigation stage. [8] In case *LPN and Finland v Commission* , the Court held that:

" The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would, in addition, be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings. " [9]

25. The Ombudsman is of the opinion that this reasoning also applies, by analogy, to documents concerning investigations brought under Article 260 TFEU, since Article 260 also has as its purpose to ensure that the Member State concerned brings itself into compliance with EU law.

26. There thus exists a general presumption that the disclosure of such documents, during the investigation stage, could jeopardise the pursuit of an amicable resolution to the issue in a spirit of co-operation and mutual trust with the aim of avoiding further legal proceedings.

27. The present request for access concerns the reply from the UK authorities to a "pre-260 letter" sent by the Commission. Such a document is central to the process of negotiation referred to above, as it outlines the position of the Member State as regards the Commission's understanding of the situation after a Court ruling. Therefore, the document whose disclosure the complainant has requested is covered by the general presumption.

28. Therefore, the Ombudsman agrees that the Commission was justified in considering that public access to the document would have undermined the protection of the purpose of investigations, within the meaning of Article 4(2), third indent, of Regulation 1049/2001.

29. Even where the disclosure of the document would undermine the purpose of an investigation, there still exists the possibility that an overriding public interest would justify the disclosure of the document. [10]

30. The complainant argued that there is an overriding public interest in disclosure of the document, namely the possibility for the public to scrutinize its content and, if necessary, to supply the Commission with additional evidence. The complainant noted in this regard that such assistance from the public is important since the Commission *" does not have investigative powers of its own in the matter [and therefore] is largely reliant on the information provided by any complainants and by the Member State concerned "* [11] .



31. The Ombudsman welcomes the efforts made by the complainant to support the Commission's investigations. Such efforts are invaluable.

32. However, the Ombudsman does not accept that the arguments presented by the complainant constitute an overriding public interest which displaces the reasons justifying the refusal to disclose the document in question. The Ombudsman accepts that releasing the document would seriously harm what is itself a public interest, namely the pursuit of a rapid, amicable resolution to the issue of non-compliance by the UK. The Ombudsman also takes the view that access to the Member State document is not necessary in order to allow the public, including the complainant, to supply the Commission with additional evidence. In this regard, the Ombudsman notes that the complainant himself has been able, throughout the entire process leading to the ruling of the Court in Case C-310/10, to provide the Commission with extensive and useful information. The complainant has corresponded with the Commission for several years concerning the Whitburn sewage system's alleged non-compliance with the Urban Waste Water Treatment Directive providing, as the Commission put it, "*enormous amounts of evidence, some of which formed the backbone of the* [infringement case before the European Court of Justice]". There is no reason to believe that his ability to provide further information will be limited by the fact that the requested document has not yet been made public.

33. Having regard to the foregoing considerations, the Ombudsman considers that the Commission has rightly concluded that, in the present case, there is no overriding public interest in disclosure.

34. On the basis of the above, the Ombudsman finds no maladministration by the Commission in this case.

35. The Ombudsman notes that the Commission has in any event made efforts to keep the complainant informed of progress in the case. In its letter to the complainant, dated 4 November 2014, the Commission recognised the frustration of the complainant with the slow progress by the UK as regards compliance with the Court judgment in Case C-310/10. The Commission explained that it had met the UK authorities on 1 October 2014 to discuss the open files and the issues of concern. The Commission noted that this meeting was preceded by meetings with interested environmental NGOs to enable the Commission to hear their views. It added that, from the discussion it had with the UK authorities, it could inform the complainant that the UK remains committed to ensuring that the upgrades in the Whitburn collecting system are delivered. The Commission also noted that it had indicated to the UK authorities, in its contacts with them, that there is a need to inform the local public, as soon as possible, of the steps that are intended to be taken. The UK authorities informed the Commission that they hoped to be able to present these to the public by end 2014 or in 2015.

36. The Ombudsman commends the Commission for its continuing efforts to keep the complainant and others, including environmental NGOs, informed of developments regarding the actions of the UK. The Ombudsman encourages the Commission to continue such steps.

37. It is also evident that since the UK authorities are currently taking steps to comply with the



Court of Justice judgment in Case C-310/10, it is wise for the Commission to leave open its Article 260 TFEU procedure until such time as the UK completes these steps. The eventual closure of the Article 260 TFEU procedure will, of course, have an impact on any future requests for public access to documents relating to that procedure. The present position reflects the fact that the Article 260 TFEU procedure regarding the UK is still ongoing. The Ombudsman expects that the Commission will react positively to any request for public access to the same document after it closes this procedure.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There was no maladministration by the Commission.

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

Emily O'Reilly

Strasbourg, 17/09/2015

[1] Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, OJ 1991 L 135, p. 40.

[2] Case C-301/10 *Commission v United Kingdom*, ECLI:EU:C:2012:633.

[3] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[4] An institution is required to release a document covered by an exception under Article 4(2) and 4(3) of Regulation 1049/2001 if there is an overriding public interest in disclosure.

[5] Case C-612/13 P *ClientEarth v Commission*, judgement of 16 July 2015, not yet published in the ECR, paragraph 57; Case C-506/08 P *Sweden and MyTravel Group* [2011] ECR I-6237, paragraph 75; Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, paragraph 66; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 36; and Case T-391/03 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 84.



[6] *Sweden and Turco v Council* , paragraph 37.

[7] *ClientEarth v Commission* , paragraph 77.

[8] Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission* , EU:C:2013:738, paragraph 65.

[9] *LPN and Finland v Commission* , paragraph 63.

[10] *ClientEarth v Commission* , paragraph 89; Case C-365/12 P *Commission v EnBW* , EU:C:2014:112, paragraph 100 and case-law cited.

[11] *Commission v United Kingdom* , paragraph 71.