FPLOGUE SOLICITORS

Our Reference: FPL/624/03172/3
Your Reference: 2024/2975

23 July 2024

By email only

DG GROW
European Commission
GROW-ACCES-DOCUMENTS@ec.europa.eu

Re: Confirmatory Application of implied decision
Our clients: Public.Resource.Org Inc and Right to Know CLG

Dear Sir or Madam

We refer to our clients' request for access to documents dated 4 June 2024 which was registered on 5 June 2024 under reference number 2024/2975. On 26 June 2024 we received notice that it was not possible to respond to the request within the prescribed time limit and that the new time limit would expire on 17 July 2024. On 16 July 2024 we received a letter from the Commission proposing a fair solution with a request for a response within 5 working days.

By virtue of Article 7(4) of Regulation 1049/2001 the failure by the Commission to make a decision within the time limit gave rise to an implied decision on 17 July 2024 refusing the request for access to documents. The proposed fair solution does not affect this.

Request for Confirmatory Application

Our clients therefore request a confirmatory application of the implied refusal dated 17 July 2024. Our clients will also provide their observations on the fair solution proposed by the Commission in the context of this confirmatory application.

Our clients sought access to a copy of each Harmonised Standard developed by CEN, CENELEC and ETSI whose reference has been published in the Official Journal and which remains in force (the **Requested Documents**).

In the request, our clients referred to the judgment of the Court of Justice in Case C-588/21 P, *Public.Resource,Org and Right to Know v Commission* which held that there was an overriding public interest in disclosure because the Requested Documents were Harmonised Standards and therefore formed part of EU law, without regard to the specific content of any particular Harmonised Standard.

Our clients also pointed out that insofar as the Requested Documents formed part of EU law relating to the environment they were "*texts of Community legislation on the environment or relating to it*" within the meaning of Article 4(2)(a) of Regulation 1367/2006 and therefore were required to be made available and

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disseminated under Article 4(1) of that Regulation in databases equipped with search aids and other forms of software designed to assist the public in locating the information they require.

Finally, the request specified the format of access as an electronic format equivalent to the format through which the Union institutions make EU law generally available via the Eur-lex service, for example as PDF or HTML files or alternatively in an existing version or format having full regard to our clients' preference per Article 10(3) of Regulation 1049/2001.

Our clients therefore request a confirmatory application of the implied refusal dated 17 July 2024.

Fair solution proposal

The fair solution proposal was received only one day before the expiration of the extended time limit for a reply under Article 7(3) of Regulation 1049/2001. It invokes Article 6(3) of Regulation 1049/2001 stating that the request concerns a "*non-verifiable number of documents considering the large, temporal, and broad scope of your request*". The proposal set out in bullet format a list of steps alleged to be needed to handle the request and states without any evidence or discussion that these steps cannot be completed within the normal time limits set out in Article 8 of Regulation 1049/2001.

The fair solution proposal points to uncited case law which it is stated requires a balance to be struck having regard to the principle of proportionality to ensure that "*the interest of the applicant for access is balanced against the workload resulting from the processing of the application for access to documents in order to safeguard the interests of good administration*".

The fair solution proposal indicates that the Commission could only handle a request for 15 to 20 Harmonized Standards in the 15+15 working day time limit prescribed by Regulation 1049/2001 before requesting our clients to state their interest in the Requested Documents and asking them to "*narrow down the scope of your request by providing an exact list of harmonised standards of interest, to reduce it to a more manageable number*".

The proposed fair solution ends by indicating that in the absence of a reply within 5 working days the Commission would "*unilaterally restrict the scope of the application to those parts that can be dealt with within the extended deadline*".

Comments on fair solution proposal

Our clients accept that in general an institution which receives a request for access under Regulation 1049/2001 is required, in principle, to carry out a concrete individual assessment of the content of the documents referred to in the request. However, this does not mean that such an examination is required in all circumstances, since it "*may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted*". Such could be the case if certain documents were "*manifestly accessible in their entirety*"[1].

In line with the considerations of the General Court in Case T-2/03, our clients accept that in principle an "*institution retains the right, in particular cases, where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of the work so caused, in order to safeguard in those particular cases,*

[1] Judgment of 13 April 2005, Case T-2/03, *Verein für Konsumenteninformation v Commission,* EU:T:2005:125, paragraphs 74 and 75

the interests of good administration". However, this "*possibility remains applicable only in exceptional cases*" as stipulated by the General Court[2].

The institution concerned bears the burden of proof of the scale of the task which it claims to exceed the limits of what may be reasonable[3]. The General Court also noted that "*where the institution has adduced proof of unreasonableness of the administrative burden […], it is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete individual examination of the documents*". The institution is obliged "*to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access*"[4].

The institution may only avoid carrying out a concrete individual examination after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work.

We now turn to the proposed fair solution. In summary our clients are of the view (a) that a concrete individual examination is not required to reply to their request; and (b) in the alternative the alleged burden of replying to the request is neither unreasonable nor disproportionate to their interest and to the public interest.

Preliminary comments

As a preliminary comment our clients note that the fair solution proposal was made only one working day before the expiry of the – already extended – time limit setting a deadline of five working days to answer and noting that failing to reply within these five working days the Commission would unilaterally reduce the scope of the request. Considering this, the fair solution proposal is ineffective since an implied decision refusing the request in its entirety arose already on 17 July 2024. As the Commission points out itself, a fair solution can only concern the content or number of documents applied for, not the deadline for replying. In addition, there is no provision which permits the Commission to unilaterally vary the scope of a request for access to documents.

As a second preliminary matter, our clients disagree that the scope of the request is broad in scope whether in terms of the number of documents or in the temporal dimension. The request was limited only to those Harmonised Standards whose reference was published in the Official Journal and which remain in force. Therefore, the temporal scope is narrow and concerned only documents which are currently in force. It does not concern, for example, documents, whose legal effect had expired.

Furthermore, the request expressly referenced the list of Harmonised Standards which the Commission itself maintains on its website[5], and whose reference has been published in the Official Journal. Therefore, the material scope of the request is well defined.

Hence, it cannot be said that the request is scoped broadly on any dimension.

It is also unclear why the Commission claims that it has to establish a complete list of the Requested Documents when (a) these form part of EU law by virtue of publication of notice in the Official Journal;

[2] Ibid paragraphs 102 and 103
[3] Ibid. paragraph 113
[4] Ibid. paragraph 114
[5] https://single-market-economy.ec.europa.eu/single-market/european-standards/harmonised-standards_en

and (b) the Commission in fact publishes such a list on its website[6] and is heavily involved in the adoption of the Harmonized Standards.

Concrete individual examination not required

In our clients' view many if not all of the steps outlined by the Commission are unnecessary and therefore the proposed fair solution is based on work that is not required to be undertaken. This is because a concrete individual examination of each document is not required in the case at hand since it is obvious that the Requested Documents must be disclosed.

As already pointed out, a complete list of the Requested Documents should already exist, and retrieval should be straightforward.

It is not necessary to retrieve individual document files to reply to our clients' request since it is only those Harmonised Standards whose reference has been published in the Official Journal and which remain in force that are sought.

The judgment in C-588/21 P held in essence that there is an overriding public interest in granting access to the Requested Documents regardless of their content. Therefore, it is unnecessary to carry out an individual examination. For the same reason, consultations under Article 4(4) of Regulation 1049/2001 are not required, since it is clear that the documents shall be disclosed. It is also doubtful that the Requested Documents are "third-party documents" in the first place since they form part of EU-law.

In a similar vein, it is clear that disclosure should be made in full and it is therefore also clear that consideration of partial disclosure is not required and consequently no work is needed to prepare redacted copies of documents. The remaining steps referred to are common to all requests for access to documents and as such cannot be invoked for the purposes of proposing a fair solution.

Request neither unreasonable nor disproportionate

The commentary on the Commission's claims in relation to the principle of proportionality are provided strictly without prejudice to our clients' view that an individual concrete examination of the Requested Documents is unnecessary in this case and are strictly provided in the alternative.

Our clients are non-profit civil society organisations both of whose missions are to ensure increased transparency and greater access to official information[7]. Their interest in the Requested Documents is therefore based on the overriding public interest in having free and open access to the law.

This interest was identified by the Court of Justice in its ruling in Case C-588/21 P as deriving from the fact that the EU "*is based on the principle of the rule of law, which requires free access to EU law for all natural or legal persons of the European Union, and that individuals must be able to ascertain unequivocally what their rights and obligations are*". The Court held that "*free access must in particular enable any person whom legislation seeks to protect to verify, within the limits permitted by law, that the persons to whom the rules laid down by that law are addressed actually comply with those rules*" [8].

The Court also recalled that "*the principle of transparency is inextricably linked to the principle of openness, which is enshrined in the second paragraph of Article 1 and Article 10(3) TEU, in Article 15(1) and Article 298(1) TFEU and in Article 42 of the Charter. It makes it possible, inter alia, to ensure that the*

[6] https://single-market-economy.ec.europa.eu/single-market/european-standards/harmonised-standards_en
[7] Please see https://public.resource.org/ and https://www.righttoknow.ie/our-objectives/
[8] Judgment of 5 March 2021, C-588/21 P, *Public.Resource.Org and Right to Know v Commission,* EU:C:2024:201 paragraph 81

administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system"[9].

In our clients' view, the Commission has not met the burden of proving that the work involved in replying to the request is unreasonable or disproportionate, nor has the Commission met the strict requirement to provide the least disproportionate proposal as to how it may reasonably reply to the request.

In the first instance, it is very difficult to envisage how it could ever be disproportionate to refuse to provide access to the text of EU law to members of the public, i.e., to limit the access to 15-20 laws, or, in the words of the Commission, to "15-20 harmonised standards". The rule of law and the principle of openness are foundational to our democracy and therefore any restrictions on the right of access to EU law would undermine the very essence of the rule of law and the principle of openness.

Second, the Commission has not provided a concrete estimate of the work involved and has included many steps which (a) are unnecessary; and which (b) it would have to carry out regardless of the scope of the request. Therefore, the Commission has not shown that the request would place an unreasonable burden on its workload.

Even if there was such an unreasonable burden involved (*quod non*), the Commission hasn't genuinely investigated all other conceivable options and explained in detail the reasons why the various options also involve an unreasonable amount of work. In fact, the Commission has only proposed one alternative namely limiting the scope of the request to 15-20 of the 8,000 or so harmonised standards which the Commission estimates to be within the scope of the request.

However, there would be also other alternatives. For example, the Commission may make the Requested Documents available on the registers envisaged by Article 11 of Regulation 1049/2001 and Article 4(1) of Regulation 1367/2006. Alternatively pursuant to Article 13(3) of Regulation 1049/2001, the Commission may establish rules providing for publication of the text of Harmonised Standards in the Official Journal.

Proposal to reduce the burden of disclosure

While our clients disagree that the Commission is correct to claim that making a decision on the request involves disproportionate work, they are mindful that there may be some administrative burden in disclosing the Requested Documents (although not such that it would be unreasonable or disproportionate) and therefore would be open to agreeing a timetable for disclosure of all of the Requested Documents over a reasonable timeframe. However, any such proposal would depend on a final decision of the Commission granting the request in full in the format requested.

Conclusion

We look forward to receipt of the Requested Documents in the format specified above by email to info@fplogue.com.

Yours faithfully

FP LOGUE LLP

[9] Judgment of 5 March 2021, C-588/21 P, *Public.Resource.Org and Right to Know v Commission,* EU:C:2024:201 paragraph 83