

Our Reference: FPL/624/03172/1

Your Reference: 2024/2823

23 July 2024

By email only

DG GROW

European Commission

GROW-ACCES-DOCUMENTS@ec.europa.eu

Re: Request for Confirmatory Application – Case 2024/2823

Our clients: Public.Resource.Org Inc and Right to Know CLG

Dear Sir or Madam

We refer to our request for access to documents dated 29 May 2024 registered on 30 May 2024 under case number 2024/2823. On 20 June 2024, we were notified that it was not possible to handle the request within the prescribed time limit and, on 24 June 2024, we were informed that the new time limit expired on 11 July 2024.

On 10 July 2024, we received the decision of the European Commission which indicated that that the requested documents had already been sent to our clients on 2 July 2024 in reply to our clients' confirmatory application 2018/5137 pursuant to Commission decision C(2024)4759 dated 1 July 2024. This communication was in fact sent by email on 3 July 2024.

This decision of 1 July 2024 arose following the judgment of the Court of Justice in Case C-588/21 P, *Public.Resource.Org and Right to Know v Commission*¹, where the Court ruled that European Harmonised Standards form part of EU law and therefore there was an overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation 1049/2001, justifying the disclosure of the requested harmonised standards². It is important to stress that this finding was based on the nature of the documents themselves, i.e., Harmonised Standards whose reference had been published in the Official Journal and their status as EU law, rather than on the specific contents. Therefore, the Court's ruling applies to the entire category of Harmonised Standards whose reference has been published in the Official Journal.

¹ Judgment of 5 March 2021, C-588/21 P, *Public.Resource.Org and Right to Know v Commission*, EU:C:2024:201

² Para 85 of the judgment

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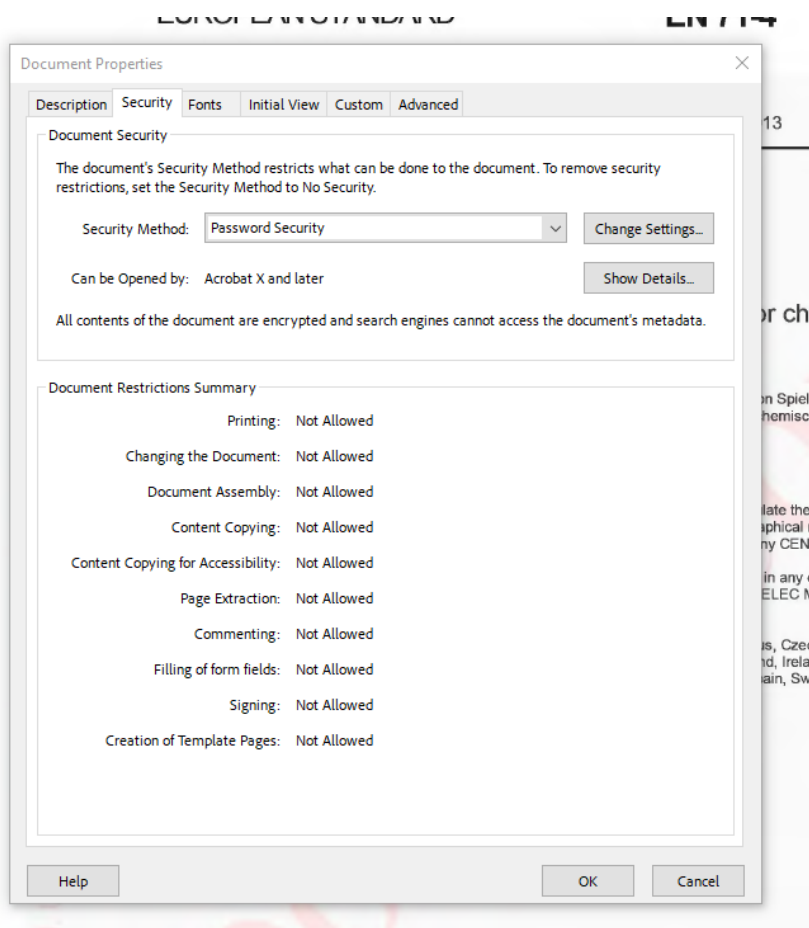
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Our clients made a new application for the four Harmonised Standards originally sought, since the original request had not expressly stated the format and they wanted to ensure that access to documents was provided in an appropriate format.

While our clients do not dispute that electronic copies of the Requested Documents were eventually released to them on 3 July 2024, they appear to be new documents that have been specifically created in response to the request. The new documents each contain a watermark “DO NOT COPY” and an entry in the left margin “Copyright (c) CEN USE ONLY FOR INTERNAL AND INFORMATION PURPOSES”. The documents also contain a header “Regulation (EC) No 1049/2001 – Access to Documents – Case 2018/5137”

It appears that virtually all functionality has been disabled in the pdf documents, so that the documents cannot be printed, the content cannot be directly copied or copied for accessibility purposes. A password appears to have been applied to the document to prevent standard pdf functionality being used (see screenshot below).



Confirmatory Application

It appears that the decision of 10 July 2024 was made under Article 10(2) of Regulation 1049/2001 which provides that “if a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligations of granting access to documents by informing the applicant how to obtain the requested document.”

Our clients respectfully make a confirmatory application on the basis that the Commission has not made a lawful decision and has misapplied Article 10(2).

The documents released on 3 July 2024 are neither in the format requested nor do they appear to be in an existing version and format. Therefore, in our respectful submission, the Commission has breached

Article 10(3) of Regulation 1049/2001 according to which the Commission must provide access to documents “*in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.*” The Commission has thus not provided lawful access to documents.

The format was specified in our clients' request for access to documents as follows:

Given the circumstances mentioned above, and the fact that the request filed on 25 September 2018 did not specify the applicants' format preference, it is appropriate that a new request be made for the Requested Documents so that the form of access may be specified.

With reference to Article 10 of Regulation 1049/2001, our clients therefore specifically request an electronic copy of the Requested Documents in a format that is 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.

In the alternative, the Commission should provide the Requested Documents in the same format in which they were received. The Commission should particularly take into account that it must provide the documents “in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference” (cf. Article 10(3) Regulation 1049/2001).

In case C-491/15, the Advocate General explained the importance of granting access in an existing format as follows³:

“The spirit of the regulation aims at enhancing transparency. Transparency requires the sharing of documents that are on file with the institutions. As submitted by the Commission in the present case, the whole purpose of transparency is to put the citizen on the same footing as an official of the institutions. Accordingly, both citizens and officials are, in principle, given access to the same documents. That means in practice that a citizen can read the same files and documents as an official working in the EU institutions, be it on paper or on screen, on the spot or at a more distant location. Conversely, the regulation cannot be interpreted as obliging the institutions to start generating documents that they do not already have at their disposal.”

In light of the above, the Commission was not entitled to edit the Requested Documents nor was it entitled to apply a password to the electronic version of the documents in order to limit the functionality since our clients would not then be on the same footing as an official of the institutions which would have access to a version without annotations and technical restrictions on use such as printing and copying.

The Commission did not have full or indeed any regard to our clients' preference which was for a format equivalent to the format through which the Union institutions make EU law generally available via the Eur-Lex service, which does not use passwords or restrict the functionality of the PDF or HTML files that are made available, or alternatively an existing version and format.

Our clients therefore ask for a confirmatory decision and release of the Requested Documents in the format specified above by email to info@fplogue.com.

Yours faithfully,



FP LOGUE LLP

³ Opinion of Advocate General Bobek of 21 September 2016, Case C-491/15 P, *Typke v Commission*, EU:C:2016:711, para 44