



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT

The Director-General

Brussels
ENV.E.3/

Mr Raphael Weyland
Raphael.Weyland@NABU.de

Subject: Your application for access to documents EASE 2023/5825

Dear Mr Weyland,

We refer to your request for access to European Commission documents registered on 4 October 2023 under the above-mentioned reference number.

In your request you ask to receive *“access to the following documents: All Letters exchanged between the European Commission and the Member State Cyprus since the complaint filed to the Commission by BirdLife Cyprus and CABS Bird Guard in July 2021 (which was shared with me within the partnership of BirdLife Europe). The complaint concerns the killing of bird species protected under the EU’s Birds Directive and how this is both enabled by relaxation of national law and by the national authorities’ systemic tolerance towards illegal trapping and killing methods”*

Your request concerns the following documents:

- Letter of Commissioner for Environment Oceans and Fisheries, Mr Sinkevičius of 12 October 2021 to the Ministers of Justice and Public Order, of the Interior and of the Environment (Ares(2021)6216701)
- The reply of the Minister of the Interior of 11 November 2021 (Ares(2021)7105611)

In your request you also state that *“Concerning an eventual confidentiality of Pilot and Infringement procedures, which could be seen as an overriding interest over transparency, it must be stressed that this reasoning only has grounds -if at all- in cases where there is bilateral exchange on opinions and possible compromises between the Commission and the Member State. In the given case though -to my knowledge- Cyprus has continued loosening the protection status by the recent amendment proposal despite all the exchanges beforehand. There is no further room for confidential negotiation, the rule of law needs to be transparently applied”*.

I regret to inform you that I am not in a position to provide you with a copy of the above-mentioned documents, because indeed they are related to an ongoing investigation proceedings (EU Pilot EUP(2015)8029) and are covered in their entirety by the exception

provided for by Article 4(2), third indent, of 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.

Article 4(2) of the Regulation 1049/2011 lays down that the institutions shall refuse access to documents where disclosure would undermine the protection of the purpose of inspections, investigations and audits unless there is an overriding public interest in disclosure.

In the matter of investigations of infringements, sincere co-operation and a climate of mutual confidence between the Commission and the Member State concerned are required, to allow both parties to engage in a process of negotiation and compromise with the search for a settlement of a dispute without bringing it before the Court of Justice: in the context of investigation proceedings at stake, the disclosure of documents concerning the procedure would undermine the proper conduct of the investigation procedure and the dialogue between the Commission and the Member State, dialogue which often allows the case to be settled before it is brought before the Court of Justice. Therefore, the safeguarding of this objective warrants the refusal of access to the document you requested.

This has been confirmed by the jurisprudence of the Court of First Instance. In its judgement of 11 December 2001 in the case T-191/99 the Court held that *"the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgement of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings"*.

In addition, in its judgement of 14 November 2013 in joint cases C-514/11 P and C-605/11 P (paragraph 63), 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"*.

Furthermore, according to Article 4(2) of the Regulation 1049/2011 disclosure of documents could nonetheless be granted in case of an overriding public interest. In your request you affirm that *"Since the case concerns mainly Cyprian legislative derogation from the Birds Directive, all letters relating to the case are linked to a national legislative procedure, which the Cyprian authorities have to publicly justify, according to democratic core principles as laid down in Article 2 TEU"*.

However, this is incorrect as the EU Pilot file does not concern *"mainly Cyprian legislative derogation"* but the practise of illegal killing of birds via different methods in

Cyprus. In any event, general arguments linked to legislative transparency and democratic principles cannot outweigh the interest in protecting the purpose of an investigation pursuant to Article 4(2), third indent, of Regulation 1049/2001 ⁽¹⁾

I have also examined the possibility of granting a partial access to the requested document, in accordance with Article 4(6) of Regulation 1049/2001. However, partial access is not possible considering that the concerned documents are at the stage of investigation proceedings covered in their entirety by the exception under Article 4(2), third indent.

Finally, I would like to state that your comment “*Cyprus has continued loosening the protection status*” is incorrect. According to the recent report (February 2023 p.6) of Birdlife Cyprus, RSPB and NABU ⁽²⁾ “*Overall, mist netting activity for autumn 2022 was 91% lower compared to the 2002 (baseline) levels within the survey area (based on analysis using the TRIM model). Compared to 2021, trapping in autumn 2022 showed an apparent decrease of up to 49% within the survey area. These results are encouraging and the efforts of the enforcement authorities, both the Game and Fauna Service and the SBA Police, are acknowledged*”. This result has also been obtained thanks to the process of negotiation that the Commission has established with the Cypriot authorities over the last years, in the context of the ongoing Pilot, and it is thus crucial to maintain it.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed to the Secretariat-General of the Commission within 15 working days upon receipt of this letter. You can submit it in one of the following ways:

by asking for a review via your portal ⁽³⁾ account (available only for initial requests submitted via the portal account),

or by mail:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Electronically signed

Florika FINK-HOOIJER

⁽¹⁾ See e.g. judgment of the General Court of 1 February 2023 in Case T-354/21, *ClientEarth*, paragraph 96

⁽²⁾ <https://www.birdlifecyprus.org/surveillance-programme>

⁽³⁾ <https://www.ec.europa.eu/transparency/documents-request>