



Emily O'Reilly

European Ombudsman

Decision

on the European Commission's refusal to give full public access to documents concerning a Horizon 2020 mineral exploration research project (cases 1132/2022/OAM and 1374/2022/OAM)

The case concerned the European Commission's refusal to give full public access to documents concerning a Horizon 2020 mineral exploration research project implemented by a pan-European consortium. The complainant, an environmental organisation from Spain, was interested in the implementation of the project at a Spanish mine, San Finx.

The Commission granted only partial access to the documents, arguing that their full disclosure would have undermined the commercial interest of the consortium's members.

After reviewing the documents, the Ombudsman considered that they contain information that can be understood as being "environmental information" within the meaning of the EU Aarhus Regulation. Such information should benefit from greater transparency. She asked the Commission to review its position with a view to granting the widest possible public access. The Commission maintained its position that no further access can be granted.

While the Ombudsman regretted the Commission's decision not to disclose more parts of the documents at stake, she acknowledged that the Commission has already made information publicly available about the research project and, in particular, about the activities at the San Finx mine. In view of this, the Ombudsman considered that further inquiries into this matter are not justified.

Having said that, the Ombudsman is concerned about the Commission's application of the EU Aarhus Regulation and the Aarhus Convention when assessing requests for public access to documents. She emphasised that the exceptions to granting public access have to be interpreted in a restrictive way as regards environmental information and reminded the Commission that transparency in this area is crucial to enhance the legitimacy of, and public trust in, the EU's activities.

Background to the complaint

1. The complainant, an environmental organisation from Spain, asked the European Commission for public access to documents concerning an EU funded research project, entitled New Exploration Technologies (NEXT).¹ The project's objective was to develop new geomodels, exploration technologies and data analysis methods in the field of mineral exploration. The project was implemented by a consortium of 16 members from six EU Member States (Germany, Spain, France, Malta, Finland and Sweden). One of the

¹ More information is available at: <https://cordis.europa.eu/project/id/776804>.

consortium's members was a Spanish mining company responsible for a testing site, the San Finx mine, which is located in the north-west of Spain.² The complainant was interested in NEXT project documents related to the San Finx mine.

2. The Commission initially refused to grant access to the documents, arguing that disclosure would undermine the commercial interests of the consortium's members.³

3. The complainant then asked the Commission to review its decision (by making a 'confirmatory application').

4. In reply, the Commission identified five documents:

- *Document 1: e-mail from the Geological Survey of Finland (GTK) to the Executive Agency for SMEs (EASME), 16 February 2021;*
- *Document 1.1 'San Finx mine and the NEXT Update', February 2021;*
- *Document 2: e-mail from the GTK to European Health and Digital Executive Agency (HaDEA), 17 June 2021;*
- *Document 2.1: San Finx documentation*
- *Document 3: e-mail from the GTK to HaDEA, 12 July 2021.*

5. The Commission refused access to document 2.1 in its entirety and granted partial access to the remaining four documents, relying on the need to protect personal data⁴ and commercial interests.⁵

6. Dissatisfied with the outcome, the complainant turned to the Ombudsman, first regarding the document that the Commission refused to disclose in its entirety, and then in relation to the documents to which it was granted partial access only.

The inquiry

7. The Ombudsman opened two inquiries into the complaints, which are treated jointly. Since the complainant did not object to the redaction of personal data, the joint inquiry focused on the Commission's application of the exception for the protection of commercial interests. As the redactions in document 1 concern personal data only, the Ombudsman's inquiry did not cover that document.

8. In the course of the inquiry, the Ombudsman inquiry team inspected the four documents at issue and the documentation relating to the consultation of the third party.⁶

² More information about the NEXT consortium is available at: <http://www.new-exploration.tech/partners>.

³ Under Article 4(2) first indent of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049>.

⁴ It redacted the names of persons identified in the documents (Article 4(1)(b) of Regulation 1049/2001).

⁵ See point 3.

⁶ Conducted in line with Article 4(4) of Regulation 1049/2001.

Arguments presented

9. The **complainant** argued that it sought public access to the documents, as there is a “*public interest in relation to the protection of the EU budget and the environment*”. In its view, all requested documents contain information related to emissions into the environment. It stated that an overriding public interest in disclosure of environmental information exists pursuant to Article 6(1) of the EU Aarhus Regulation.⁷

10. The complainant also noted that the NEXT project is already under intense public scrutiny, including from members of the European and Spanish parliaments.⁸

11. The **Commission** stated that the requested documents relate to one of the project’s deliverables, namely deliverable 8.3 (ethics). Deliverable 8.3 was marked in the grant agreement as ‘*confidential*’. It then noted that, in accordance with the Horizon 2020 Regulation,⁹ and the grant agreement,¹⁰ documents identified as confidential by a grant applicant cannot be disclosed during the implementation of the project and for four years thereafter. In this regard, the Commission said it consulted with the coordinator of the project, who informed the Commission that the beneficiaries opposed the disclosure of the documents.

12. The Commission noted that it balanced these confidentiality requirements against the public access provisions in Regulation 1049/2001¹¹ and, as a result, granted partial access. It concluded that there was a real and non-hypothetical risk that disclosing the documents in full would undermine the commercial interests of the third party concerned.

13. The Commission argued that the undisclosed parts did not contain environmental information or information related to emissions into the environment within the meaning of Article 6(1) of the EU Aarhus Regulation. It considered that the complainant did not show that there was an overriding public interest in (full) disclosure of the documents. The Commission stated that it could not, itself, identify any further public interest capable of overriding the protection of commercial interests.

⁷ Regulation 1367/2006 of the European Parliament and of the Council 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/TXT/?uri=CELEX:32006R1367>.

⁸ The complainant referred to a question from a Member of the European Parliament to the European Commission: https://www.europarl.europa.eu/doceo/document/E-9-2021-003447_EN.html and to a question from a Member of the Spanish Parliament to the Spanish Government: https://www.congreso.es/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&iniciativas_mode=mostrarDetalle&iniciativas_legislatura=XIV&iniciativas_id=184%2F063488.

⁹ See Article 3 of Regulation 1290/2013 of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in “Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)”: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1290>.

¹⁰ The grant agreement of the NEXT project is not publicly available. However, the Commission publishes a Model Grant Agreement valid for all Horizon 2020 grants which can be consulted for illustrative purposes. The Commission referred to the confidentiality provisions under Article 36.1: “*During implementation of the action and for four years after the period set out in Article 3, the parties must keep confidential any data, documents or other material (in any form) that is identified as confidential at the time it is disclosed (‘confidential information’)*”: https://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/amga/h2020-amga_en.pdf

¹¹ The Commission referred to the Judgment of the General Court of 15 December 2021, *Patrick Breyer v European Research Executive Agency*, Case T-158/19: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019TJ0158>.

The Ombudsman's proposal for a solution and the Commission's reply

14. The Ombudsman noted in her **proposal for a solution**¹² that there has been a significant public interest in the mining activities at the San Finx mine, not least because of their allegedly high environmental and social costs.

15. The documents at stake are one of the deliverables of the NEXT project and its annexes (documents 1.1 and 2.1) and two e-mails exchanged between the Commission and the coordinator of the project in relation to that deliverable (documents 2 and 3). Some of these documents contain the same information. According to the Commission, the beneficiaries of the project consider these documents to be confidential.¹³

16. The Ombudsman noted that, according to the Union courts,¹⁴ the fact that documents are considered as 'confidential' pursuant to the Horizon 2020 Regulation¹⁵ constitutes only an *indication* that their content is sensitive. That indication is not, on its own, sufficient to justify the application of the exception referred to in the first indent of Article 4(2) of Regulation 1049/2001, which concerns the protection of commercial interests. Moreover, the application of this exception could be overturned if an overriding public interest in disclosure exists.¹⁶

17. The inspection of the four documents confirmed that they contain, in parts, information on investments, costs, workforce, commercial relations of a third party (one of the participants in the consortium) and administrative information. The Ombudsman considered it reasonable to assume that the disclosure of this information could undermine the commercial interests of the third party concerned.

18. The Ombudsman also considered that these parts of the documents do not contain environmental information and that, therefore, there was no overriding public interest in their disclosure.¹⁷

19. However, the Ombudsman took the view that certain limited parts in document 1.1 can be understood as being '*environmental information*' within the meaning of the EU Aarhus Regulation and that parts of that information could be understood as relating to '*emissions into the environment*'. She considered that there was a public interest in having access to those parts. She further noted that for information relating to emissions into the environment, an overriding public interest in disclosure is deemed to exist regarding the exception for the protection of commercial interests.

¹² The Ombudsman's proposal for a solution in this case is not published as certain elements in it remain confidential.

¹³ See paragraph 11.

¹⁴ See *Patrick Breyer v European Research Executive Agency*, paragraphs 70-71.

¹⁵ Article 3 of Regulation 1290/2013: "[s]ubject to the conditions established in the implementing agreements, decisions or contracts, any data, knowledge and information communicated as confidential in the framework of an action shall be kept confidential, taking due account of Union law regarding the protection of and access to classified information".¹⁵

¹⁶ See *Patrick Breyer v European Research Executive Agency*, at paragraphs 181-205.

¹⁷ In particular to information relating to the ownership and the transfer of ownership of assets, investments, information relating to costs and workforce and certain administrative information, Document 2.1 in its entirety and parts of documents 1.1 (including all the annexes), 2 and 3.

20. In addition, the Ombudsman pointed out that some of the redacted information in documents 2 and 3 had already been disclosed by the Commission in reply to written questions from the European Parliament.¹⁸ Therefore, it was not clear to the Ombudsman why the Commission did not release this information to the complainant.

21. In her proposal for a solution, the Ombudsman therefore asked the Commission to review its position with a view to granting the widest possible public access to the documents requested.

22. In **reply to the solution proposal**,¹⁹ the Commission maintained its position that no further information could be disclosed.

23. The Commission said that the information in the documents originates from a third party and is more detailed than the publicly available information about the project. It restated that the documents concern a deliverable of the NEXT project which was marked '*confidential*' in the grant agreement. The Commission repeated its arguments from the confirmatory decision that it needed to apply Regulation 1049/2001 "*in a way which is consistent with the confidentiality obligations laid down in the grant agreement, read in conjunction with Article 3 of Regulation (EU) No 1290/2013*".

24. The Commission stated that it had in fact concluded that, even if the documents were considered as confidential in the grant agreement, these could not be fully covered by the exception for the protection of commercial interests. This is why it disclosed those parts that did not contain sensitive business information. At the same time, it withheld other parts that could, if disclosed, have undermined the legitimate commercial interests of the third party concerned, such as information about workforce and costs, operational issues, permitting procedures, investments and commercial relations of the third party concerned.

25. The Commission further maintained its assessment that the withheld parts of the documents do not contain environmental information in the sense of the EU Aarhus Regulation.

26. The Commission says that it is unclear how the disclosure of "*information about the know-how and the business activity of the company concerned, such as the choice of software, materials and methods used to support research activities, or information on administrative concessions*" would qualify as environmental information within the meaning of the Aarhus Regulation. The documents did not concern information such as policies, legislation, programmes, environmental agreements or measures or activities designed to protect elements of the environment.

27. In the Commission's view, even if the information at stake could be considered *environmental information*, an overriding public interest in disclosure is deemed to exist only with regard to information about emissions into the environment.²⁰ It argued that the redacted parts of the document do not contain such information.

¹⁸ E-003447/2021, available at: https://www.europarl.europa.eu/doceo/document/E-9-2021-003447_EN.html.

¹⁹ The Commission's reply is available at: <https://www.ombudsman.europa.eu/en/doc/correspondence/en/168042>.

²⁰ Article 6(1) of the EU Aarhus Regulation.

28. The Commission also recalled that it is for applicants to demonstrate the existence of an overriding public interest in disclosure. In this case, the arguments put forward by the complainant were not considered as sufficient to justify the existence of such interest. The Commission disagrees with the complainant's claim that the documents "*have as their main subject the emissions into the environment from the San Finx mine*".

The Ombudsman's assessment after the proposal for a solution

29. The Ombudsman has carefully examined the Commission's response and has, on that basis, again reviewed the documents. She agrees with the Commission's view that the documents do not "*have as their main subject the emissions into the environment from the San Finx mine*" (emphasis added). The reason such a view can be taken is because, as the Ombudsman understands, the collection of sampling rocks necessary for the NEXT project was done without any pumping or discharge of water.²¹ However, the Ombudsman still considers that some limited information in the redacted parts could be understood as relating to '*emissions into the environment*'.

30. In any case, it is clear that the documents contain '*environmental information*'.

31. The Commission's reply seems to suggest that only "*information such as policies, legislation, programmes, environmental agreements or measures or activities designed to protect elements of the environment*" fall within the remit of the EU Aarhus Regulation. This is not correct. As pointed out in the solution proposal, the aim of the EU Aarhus Regulation is to ensure the widest possible access also to information concerning *factors*, such as emissions, and *measures*, such as activities, *affecting or likely to affect* elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites.²² In other words, not only measures to protect the environment should benefit from greater transparency, but also, and even more importantly, measures that *affect* the environment in general.

32. While the NEXT project does not concern mineral *extraction* (that is, the commercial exploitation of the mine), but rather is a research and innovation project relating to mineral exploration and exploitation, this does not mean that it will not, if carried out, *affect* the environment.

33. In this context, the Ombudsman refers to findings of the Aarhus Convention Compliance Committee, clarifying that mining licences and other mining-related information constitutes '*environmental information*'.²³ As the EU Aarhus Regulation

²¹ See footnote 18.

²² See in particular Article 2(1)(d)(ii) and (iii) of the EU Aarhus Regulation.

²³ See Aarhus Convention Compliance Committee Findings and recommendations with regard to communication ACCC/C/2012/69 concerning compliance by Romania, available at: https://unece.org/sites/default/files/2021-12/Compilation_of_CC_findings_14.12.2021_eng.pdf

Mining licences and other mining-related information

51. With respect to the mining licences and the other mining-related information requested by the communicants, the Committee notes that article 2, paragraph 3 (a), of the Convention stipulates that the state of elements of the environment includes soil, landscape and natural sites. Exploration/exploitation of non-ferrous ore is an activity affecting or likely to affect the state of these elements of the environment, within the definition of article 2, paragraph 3 (b). Similarly, a mining licence is an administrative measure affecting or likely to affect the state of elements of the

implements the Aarhus Convention,²⁴ the Committee's findings are relevant in the context of this case.

34. In view of the above, the Ombudsman disagrees with the Commission's statement that the documents do not contain '*environmental information*' within the meaning of the EU Aarhus Regulation. A public interest in accessing such information is therefore deemed to exist and the Commission should have taken this into account in its assessment of the request. This argument was also put forward by the complainant in its confirmatory application.

35. The question remains, however, whether the fact that certain parts in document 1.1 constitute '*environmental information*' is sufficient to establish an *overriding* public interest in their disclosure. According to Article 6(1) of the EU Aarhus Regulation, the public interest in disclosure is deemed automatically to override the interests in the exceptions set out in the first and third sub-paragraphs of Article 4(2) of Regulation 1049/2001 (including the protection of commercially confidential information) only as regards information relating to emissions into the environment. Any extension of the overriding public interest in disclosure must be based on an individual assessment of the documents and the context.

36. The Ombudsman understands that the complainant is concerned that the implementation of the NEXT project has given rise to mining activities at the San Finx mine, resulting in water being discharged (emissions into the environment) without the necessary permits. If the documents were to contain any information in relation to the complainant's views, that would certainly be sufficient to establish an overriding public interest in their disclosure. However, the documents do not contain information of this nature.

37. At the same time, the Ombudsman regrets that the Commission failed to address in its reply to the solution proposal her finding that some of the redacted information contained in documents 2 and 3 had already been made public and should have therefore been disclosed.²⁵

38. While the Ombudsman regrets that the Commission did not accept her proposal for a solution, she acknowledges that the Commission has already made information publicly available about the NEXT project and, in particular, about the activities at the San Finx mine. For example, it is public information that rock sampling took place at the San Finx mine in the context of the project, without being necessary to pump or discharge water, at which levels of the mine and on which dates, as well as the estimated budget and workforce employed by the consortium member under scrutiny by the complainant. In view of this, the Ombudsman considers that further inquiries into this matter are not justified.

environment. While not at this point of the findings precluding that one of the exceptions in article 4, paragraph 4, may exempt certain aspects of the mining licences and the mining-related information from disclosure, the Committee finds that the licences and other mining-related information requested, including the "quantities of non-ferrous ore" that were entitled to be extracted under those licences, are clearly "environmental information" within the scope of article 2, paragraph 3, of the Convention. Thus, it was not open for the Party concerned to refuse access to this information on the ground that it was not "environmental information".

²⁴ See Recitals 3 to 7 of the EU Aarhus Regulation.

²⁵ See paragraph 20.

39. Having said that, the Ombudsman is concerned about the Commission's application of the EU Aarhus Regulation and the Aarhus Convention when assessing requests for public access to documents. She emphasises that the exceptions to granting public access have to be interpreted in a restrictive way as regards environmental information.

40. Transparency in EU environmental decision making is a central concern of the Ombudsman. This is why she recently launched a public consultation, aiming at evaluating whether citizens have access to up-to-date environmental information, allowing them to exercise their right to democratic scrutiny in an area of high importance and public interest. The results of the public consultation will be published shortly and the Ombudsman will then consider whether to initiate further strategic work in this area.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

While the Ombudsman regrets that the Commission did not give further public access to the requested documents, she is of the view that no further inquiries are justified.

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

A handwritten signature in black ink, appearing to read 'Emily O'Reilly', with a long horizontal flourish extending to the right.

Emily O'Reilly
European Ombudsman

Strasbourg, 17/04/2023