

**Subject: ACCC/C/2021/186**

Following the preliminary admission of the complaint lodged by the Montescola Foundation, the Portuguese Environment Agency, I.P., **in addition** to what was stated in the answers offered on July 7, 2021 and October 15, 2021, whose contents are fully reproduced, hereby presents its contributions.

**§ The deferral of the request for access to documentation**

We begin by reiterating and clarifying that the Portuguese Environment Agency, I.P., did not refuse to provide any environmental information to the complainant. What is at issue is the **deferral** of access to documents, under the terms and for the purposes of paragraph 3 of article 6 of Law n. 26/2016, of August 22, which states:

*“3 - Access to administrative documents preparatory to a decision or contained in uncompleted processes may be deferred **until** the **decision is taken, the case is filed or within a year** after its preparation, depending on the event that occurs **first**.”*

We further emphasize that this rule, comprised in a Law issued by the Parliament, takes precedence in the provisions of subparagraph c) of paragraph 3 of article 4 of the Convention and in subparagraph d) of paragraph 1 of article 4 of Directive n. 2003/4/EC of the European Parliament and of the Council of 28 January 2003. Although the national legal system does not go as far as permitted, limiting itself to deferring the request, in the set down terms. In other words, we take the liberty of stating that a balanced solution has been established, taking into account the interests at stake.

In this context, specifically with regard to the aforementioned subparagraph c) of paragraph 3 of article 4 of the Convention, we recall the Committee's statement in the context of communication ACCC/C/2010/51<sup>1</sup>:

*“82. With respect to article 4, paragraph 3 (c), the Committee notes that authorities may refuse to grant access to material which is in the course of completion only if this exemption is provided under national law or customary practice. Indeed, the legislation of the Party concerned specifies that public authorities may refuse a request for environmental information if the request concerns material in the course of completion of unfinished documents or data (Government Decision 878/2005, art. 11, para. 1).”*

**§ The lack of due prior use of available national procedural means**

Notwithstanding the foregoing, we reiterate that the complainant **did not file any subpoena action** for the provision of information, consultation of processes or issuing of certificates against the Portuguese Environment Agency, I.P.

In fact, the complainant requested the subpoena to provide information, consultation of processes or issuing certificates to the Ministry of the Environment and Energy Transition. It so happens that, under the terms of paragraph 1 of article 1 of Decree-Law n. 56/2012, of 12 March,

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<sup>1</sup> Available in [https://unece.org/DAM/env/pp/compliance/CC-46/ece\\_mp.pp\\_c.1\\_2014\\_12\\_e.pdf](https://unece.org/DAM/env/pp/compliance/CC-46/ece_mp.pp_c.1_2014_12_e.pdf)

the Portuguese Environment Agency, IP, is a public institute integrated in the indirect administration of the State, being, as such, a legal organization governed by public law, ruled by the provisions applicable to public legal organizations in general. As such, it will have to be represented, in court or in the practice of legal acts, by the chairman of its board of directors, by two of its members or by representatives specially designated for that purpose (as provided for in paragraph 3 of article 21. of the Public Institutes Framework Law).

That is, the Portuguese Environment Agency, I.P., is a separate legal entity from the Ministry of the Environment and Energy Transition, and the aforementioned Ministry does not have hierarchical competence over it.

In view of the above, by judgment given on October 21, 2021, in case n. 121/21.6BEMDL, which was brought before the Administrative Court of Lisbon, the dilatory exception consisting of the defendant entity's passive illegitimacy was sustained and, consequently, the Ministry of the Environment and Energy Transition was acquitted of the case (as per document attached).

We also take the liberty of clarifying that the delays observed in the above mentioned lawsuit were also due to the fact that the complainant initially brought it before a court with no territorial jurisdiction, therefore a territorially incompetent court, in addition to bringing the lawsuit against a legal entity other than the Portuguese Environment Agency, IP.

That is, even if the complainant does not agree with the application of the provisions of paragraph 3 of article 6 of Law n.º 26/2016, of 22 August, which expressly allows the **deferral** of access to documents, **it holds the right** to request the summon of the Portuguese Environment Agency, I.P., to this end, before the Administrative Circle Court of Lisbon.

#### Which the complainant did not do.

We also recall that the Portuguese legal system provides the interested parties with several (judicial) means to enforce the rights and claims they may have against the Public Administration. As such, in addition to the aforementioned action of summoning the administrative entity to provide information, allowing the consultation of documents or the issuing of certificates (provided for in article 104 and following of the Code of Procedure in the Administrative Courts), the complainant will be able to use the administrative procedure action to condemn the Administration to a due act (in accordance with Articles 66 to 71 of the Code of Procedure in Administrative Courts) and also the right of popular action (Article 52 of the Constitution of the Portuguese Republic and Law n. 83/95, of 31 August).

Which the complainant did not do either.

In short, the **complainant has not made use of the domestic procedural remedies that were available and at its disposal.** As such, in line with the Committee's decision in case PRE/ACCC/C/2019/166<sup>2</sup>, the present complaint should, unless otherwise understood, be dismissed.

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<sup>2</sup> Available in [http://www.unece.org/net4all.ch/fileadmin/DAM/env/pp/compliance/C2019-166/Correspondence\\_with\\_the\\_communicant/toCommC166\\_16.07.2019.pdf](http://www.unece.org/net4all.ch/fileadmin/DAM/env/pp/compliance/C2019-166/Correspondence_with_the_communicant/toCommC166_16.07.2019.pdf)

## § The nature of CADA's opinion

We reiterate that the opinions issued by CADA **are not binding** to the Public Administration. Notwithstanding, the complainants can contest the decisions that are given by the Public Administration, under the terms of paragraph 6 of article 16 of Law n.º 26/2016, of 22 August.

In this present situation, following insufficient clarification, CADA's opinion does not address the **deferral** of access of the requested documents. As such, contrary to what is customary, its advice was not followed within the decision taken by the Portuguese Environment Agency, I.P.

Therefore, the complainant once again had the opportunity to challenge the decision. Which, again, it failed to do.

## § Provided documents

Finally, we recall that the Portuguese Environment Agency, I.P., through official letters S025768-202104-DAIA.DAP, S042852-202107-DAIA.DAP and S051631-202108-DAIA.DAP had already made available to the complainant the following documents:

- a) Final version of the Environmental Impact Study and Extraction Plan/Mine Plan (Volume I and Project Annexes), documents that support the public consultation and pronouncement of the other entities for the purpose of environmental assessment of the project in question;
- b) Initial version of the Environmental Impact Study submitted by the proponent, and which released the instruction of the Environmental Impact Assessment process;
- c) Request made by the Portuguese Environment Agency to the proponent for the submission of additional elements under article 14, n. 9 of Decree-Law n. 151-B/2013, of October 31, in its current wording, as well as the sectoral statements issued by each of the entities represented in the Evaluation Committee (CA) and which supported the aforementioned request.

Furthermore, it should be highlighted that one year has elapsed since the proponent's reply to the Portuguese Environment Agency's request for further details, as well as since the pronouncement of the Evaluation Committee on the compliance of the Environment Impact Assessment, in accordance with the provisions of paragraph 3 of article 6 of Law no. 26/2016, of 22 August, under the letter n. S066402-202111-DAIA.DAP, of 18 February 2022, sent by email, a copy of which is now attached, and all these elements were made available to the complainant through the link: <https://nbox.apambiente.pt/s/3T2fiNs3re7oAzb>.