



EUROPEAN COMMISSION  
SECRETARIAT-GENERAL

The Secretary General

Brussels, **17 FEB. 2006**  
SG/B/2/MIB/md D(2006) **1719**

Dr Andrea Raccanelli  
Bornheimer Str. 34  
D-53111 Bonn

**Subject: Your confirmatory application for access to documents under  
Regulation 1049/2001 regarding public access to documents**

Dear Mr Raccanelli,

I refer to your letter of 19 December 2005, by which you request a review of the decision of Directorate-General for Employment, Social Affairs and Equal Opportunities not to grant you access to the documents you requested, i.e. the correspondence exchanged to date between the Commission services and the German Authorities regarding your complaint on the discriminatory treatment of EU migrant workers in relation to the access to research posts at the Max-Planck Society (complaint 2004/4512).

The documents concerned by your request are the Commission's letter of 8.12.2004 to the German Authorities and the German Authorities' reply of 18.01.2006. The latter contains an attachment (the guidelines entitled "*Richtlinie der Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. für die Förderung des wissenschaftlichen Nachwuchses (Inland) und die Förderung der wissenschaftlichen Zusammenarbeit mit dem Ausland*") of which you were already provided with a copy (cf. Commission's letter of 9.08.2005, ref. 12799). We consider, therefore, that this attachment is outside the scope of your request.

Having carefully examined your request and the documents concerned on the basis of Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>, I have come to the conclusion that the initial refusal has to be confirmed for the reasons set out below.

**Protection of the purpose of investigations**

The requested documents are correspondence exchanged between the Commission services and the German Authorities in the framework of the investigation of the above-mentioned complaint. These documents are part of such preliminary exchanges that are

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<sup>1</sup> OJ L 145 of 31.5.2001, p.43

necessary for the Commission services in order to be able to assess national situations where a breach of Community law might exist.

Disclosure of these preliminary exchanges at this stage of the ongoing investigation would seriously undermine the protection of the purpose of the Commission's investigation.

Indeed, in the framework of ongoing investigations, there has to be a climate of mutual confidence between the Commission and the Member State concerned in order for both parties to engage in a process of negotiations and compromise with a view to finding a settlement to a dispute without having to bring it before the Court of Justice. Disclosure of the documents concerned at this stage of the ongoing investigations would undermine the Commission's capacity to deal with this matter since it would jeopardise the dialogue between the Member State and the Commission which often leads to a settlement before the case is brought before the Court.

This interpretation has been confirmed by the Court of First Instance, namely in the "Petrie" judgement<sup>2</sup>, where the Court stated the following:

*"68. (...) As the Court pointed out in paragraph 63 of its judgement in WWF (cited above in paragraph 59), 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 judgement, 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, which comes within the first category of exceptions in Decision 94/90."*

Hence, disclosure of the documents concerned at this stage of the ongoing investigations would undermine the protection of the purpose of the Commission's investigations. Therefore, these documents are covered by the exception laid down in Article 4(2), third indent, of Regulation 1049/2001<sup>3</sup> and can not be disclosed.

In your confirmatory application, you argue that, in the current case, there is no longer an ongoing active investigation, since the Commission itself, in its letter of 9.08.2005, had considered the investigation completed, and suggested the closure of the case unless you had new evidence to provide.

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<sup>2</sup> Case T-191/99, judgement of 11 December 2001

<sup>3</sup> *"The institutions shall refuse access to a document where disclosure would undermine the protection of (...) the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."*

In this respect, it should be stressed that an investigation is considered to be ongoing until the corresponding case has been officially closed by the Commission. The fact that the complainant is informed, in writing, of the results of the investigation already carried out, as well as of the Commission's intentions to close the case unless new evidence is provided allowing continuing the investigation, does not mean that the investigative phase has ended. On the contrary, should the Commission receive new information that might prove that there is a breach of Community law, the investigation will continue. In the present case, following the additional information you provided to the Directorate-General for Employment, Social Affairs and Equal Opportunities, the latter is envisaging to send another letter to the German Authorities. The investigations are, therefore, still ongoing.

In your confirmatory application, you further argue that, given the inviolable rights of defence of the petitioner party, the knowledge of the requested documents is essential for conducting the case.

However, it should be reminded that the ongoing procedure is a procedure between the Commission and the Member state concerned and that the complainant is not a party in this procedure. The latter is informed, in writing, of the steps taken in response to his complaint. As above mentioned, in the present case, you have already been provided with relevant information on this matter by the Directorate-General for Employment, Social Affairs and Equal Opportunities.

### **Overriding public interest in disclosure**

This exception to the right of access must be waived if there is an overriding public interest in disclosing the documents concerned. In your confirmatory application, you argue that, in the current case, there exists an overriding public interest in disclosure, since the matter under discussion concerns injury to the rights of non German PhD students and so involves the fundamental principles of the Treaty and the inviolable human rights.

In this respect, I would like to stress that it is precisely in order to ensure that the Member States correctly apply Community legislation and, thereby, EU citizens have their rights respected, that the Commission is investigating the present case. Since the interest to protect is precisely a swift and correct settlement of the case, I fail to see any element that would enable me to conclude that there would be an overriding public interest in disclosure, in the sense of the Regulation. On the contrary, the public interest of protecting the ongoing investigation clearly outweighs any possible public interest in disclosure of the concerned documents.

In these circumstances, I have to conclude that there is no evidence of an overriding public interest in disclosure, in the sense of Regulation 1049/2001. The public interest in this case is rather not to jeopardise the Commission's capacity to monitor the correct application of Community law.

### **Partial access**

In your confirmatory application, you also argue that, even when the release of documents is prejudicial, the principle of proportionality obliges the Commission to allow access to those documents, or parts thereof, that are not detrimental to the ongoing investigation.

Indeed, I have also considered granting partial access to the concerned documents, in accordance with Article 4(6) of Regulation 1049/2001. However, both letters are short documents, which deal exclusively with the issue of your complaint. For that reason, the invoked exception applies to the entirety of their content. Consequently, a partial access is not possible.

**Means of redress**

Finally, I would like to draw your attention to the means of redress that are available, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 230 and 195 of the Treaty establishing the European Community.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Catherine Day', with a small flourish below the name.

Catherine Day