

Catherine Day
Secretary-General
European Commission
B-1049 BRUSSELS
catherine.day@ec.europa.eu

**AMNESTY
INTERNATIONAL**



EUROPEAN INSTITUTIONS OFFICE

27 February 2014

Ref: B1531

Dear Secretary-General Day,

CONFIRMATORY APPLICATION REGARDING ACCESS TO DOCUMENTS RELATING TO EUROPEAN COMMISSION'S PENDING INVESTIGATION CONCERNING ALLEGED DISCRIMINATION OF ROMA IN ITALY

Further to the Director-General of DG Justice Ms Françoise Le Bail's refusal to our access to information request, please find attached a confirmatory application regarding access to documents in relation to the ongoing investigations into alleged Roma discrimination in Italy.

During our meeting on the occasion of the visit of our Secretary-General Mr Salil Shetty in January, I was heartened by your evident commitment and openness to engage with civil society. I greatly valued the exchange of views and hope that this can be repeated again perhaps closer to the beginning of the mandate of the new Commission.

At that meeting we discussed the pressing issue of Roma discrimination in Europe and spoke of the Commission and Amnesty International's common goals of tackling this problem.

You will find the detailed legal arguments relating to our appeal in the attached submission. We argue that there is an absence of relevant and sufficient reasons to justify the refusal of disclosure in the present case and that there is an overriding public interest in disclosure.

I trust given your overall commitment to good governance and to human rights that in reviewing this dossier you will bear in mind the relative weight and importance of human rights related concerns to society when it comes to access to information.

We look forward to your response, should you require any further information or have any questions with regard to our sources please do not hesitate to contact me.

Yours sincerely,

Dr. Nicolas J. Beger
Director
Amnesty International European Institutions Office

CONFIRMATORY APPLICATION REGARDING ACCESS TO DOCUMENTS RELATING TO EUROPEAN COMMISSION'S PENDING INVESTIGATION CONCERNING ALLEGED DISCRIMINATION OF ROMA IN ITALY

Under Article 15 (3) of the Treaty on Functioning of the European Union on the right of access to documents, as governed by Regulation (EC) No 1049/2001 Amnesty International submitted an access to information request to Vice-President Viviane Reding relating to the European Commission's pending investigation concerning alleged discriminatory treatment of the Roma by Italian authorities, regarding the Roma's rights, inter alia, to adequate housing and due process.¹

More precisely, we requested access to:

- 1) All respective communication between the European Commission and the government of Italy and other public authorities in Italy, in particular:
 - All letters and questions sent to the Italian authorities following up on the Commission's concerns about discrimination against Roma
 - All the correspondence from the Italian authorities in response to this Commission requests
 - Any other relevant correspondence between the Commission, the Italian authorities and other stakeholders
- 2) Any internal document of the Commission's services concerning the assessment of the situation and the progress of the procedure, including for example:
 - Working documents assessing information obtained through the Commission's own investigation or provided by other stakeholders
 - All internal Commission briefings on the process of the EU pilot procedure
- 3) Minutes of any relevant meetings in the Commission where the issue was discussed
- 4) Any other relevant document to the issue (e.g. individual complaints)
- 5) The Commission's assessment of the implementation of the Race Equality Directive in Italy

In her letter of 6 February 2014², Director-General of DG Justice Ms Françoise Le Bail (the Director-General) informed us that the Commission would release the document mentioned in point 5 of our request, and made available the Commission's assessment from 2004 of the transposition of the Racial Equality Directive in Italy. However, the latest assessment of the implementation of this Directive in Italy, which should have informed the recent joint report by the Commission on the application of the Racial Equality Directive and the Employment Equality Directive³, has not been disclosed.

We were also informed, in relation to documents listed under point 4 of our request, that the Commission never received any individual complaints concerning discrimination of the Roma in Italy.

¹ The access to information request, made on 10 December 2013, was registered as GESTDEM 2013/6268 and is available at http://www.asktheeu.org/en/request/discrimination_against_roma_eu_p/new. This request followed a submission sent by Amnesty International to the Commission in July 2012 (available at http://www.amnesty.eu/content/assets/Doc2012/AI_submission_to_the_EC_to_trigger_an_infringement_procedure_against_Italy.pdf), where we provided evidence that formal infringement proceedings against Italy before the CJEU should be urgently launched in order to stop and sanction alleged breaches by Italy of the Race Equality Directive with respect to Roma evictions on Italian territory.

² Letter of 6 February 2014, ref. Ares (2014)286859, available at <http://www.asktheeu.org/en/request/1081/response/4097/attach/3/RE%20GESTDEM%202013%206268.pdf>.

³ Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), COM (2014) 2 final.

As to the documents requested under point 1, 2 and 3, the Director-General informed us that she was not in a position to grant disclosure of any of such documents.⁴

The refusal is based on the presumption that disclosure of these documents "might jeopardize an amicable solution of the dispute and thus the whole process of investigation and inspection". In particular, the Director-General maintains that such disclosure is likely to undermine genuine cooperation and an atmosphere of mutual trust between the Commission and member state concerned, and can therefore be legitimately refused, unless there is an overriding public interest in disclosure.

In accordance with the procedure indicated in the letter from the Director-General, **we hereby request this position to be reviewed and we thus confirm with the present letter our initial request for access to all the documents mentioned above**, on the basis of the reasons which follow.

1) The absence of relevant and sufficient reasons to justify refusal of disclosure in the present case

Amnesty International believes that a human rights compliant interpretation of the right of access to documents enshrined in Article 42 of the Charter of Fundamental Rights of the European Union (CFR) should in principle imply a clear presumption in favour of the right to information, unless relevant and sufficient reasons provided by the public authorities can justify a refusal to disclosure in the name of the protection of other legitimate and objective interests.

This approach has been endorsed in recent years by a growing body of international and comparative jurisprudence on the basis of the content of the fundamental right to freedom of expression and information, guaranteed by international human rights standards⁵ and also reaffirmed by Article 11 CFR.

According to this interpretation, the fundamental right to seek, receive and impart information implies that all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests. Therefore, this right places an obligation upon public authorities to facilitate the uncovering of information to the public, unless limitations on this right, to be set down precisely in law, appear necessary and proportionate to the aim of protecting other rights and legitimate interests. To that extent, any restrictions should be clearly and narrowly drawn and subject to particularly strict "harm" and "public interest" tests.⁶

At European level, such an approach has been endorsed by the Council of Europe⁷ and is also reflected in the recent case-law of the European Court of Human Rights (ECtHR) with respect to Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) whose meaning and scope, pursuant to Article 52(3) of the CFR, are the same as those guaranteed by Article 10 CFR.

⁴ These were listed in the reply from the Commission and include: internal assessment of DG Justice from March 2012; letter of 24 September 2012 from DG Justice to Italy; two replies of Italy of 29 November 2012 and of 21 May 2013; assessment requested by DG Justice from the European Network of Legal Experts in the Non-discrimination field and the reply received from the Network in February 2013, DG Justice's internal assessment on the follow-up to the file; internal discussions with our hierarchy on the file and internal briefings mentioning the file.

⁵ See in particular Article 19 of the Universal Declaration on Human Rights and Article 19 of the International Convention on Civil and Political Rights (ICCPR).

⁶ See, for example, the judgement of 19 September 2006 of the Inter-American Court of Human Rights in the case *Claude Reyes and others v Chile*, concerning a refusal to a request for information filed by a group of environmental activists relating to approval of a major logging project, where the Court unanimously found a violation of Article 13 of the Inter-American Convention on Human Rights, protecting – among other things – the freedom to seek and receive information.

⁷ See Council of Europe Convention of 18 June 2009 on access to official documents (CETS No. 205), currently open for signatures and expected to enter into force upon ten ratifications. The Convention recognizes a general right of access to official documents held by public authorities, considering it and maintains that limitations on this right should be permitted only in order to protect certain interests like national security, defence or privacy.

The ECtHR has in fact recently advanced towards a broader interpretation of the notion of “freedom to receive information” and thereby towards the recognition of a right of access to information. With a view to allowing the public to have an adequate view of, and to form a critical opinion on the situations in a given country, the ECtHR interpreted this right as imposing a positive obligation for public authorities to supply relevant public information and give access to official documents regarding matters of public interest or an ongoing public debate. The ECtHR clarified, in this respect, that while this right could not be regarded as absolute and may be restricted to balancing competing interests in accordance to the circumstances of the case, public authorities are, in principle, under a strict scrutiny as to whether the reasons invoked to refuse a request for access to such documents can be regarded as relevant and sufficient.⁸

The Court of Justice (CJEU) has recently found that documents concerning an infringement procedure during its pre-litigation stage, which have neither been closed by the Commission nor brought before the CJEU, are in principle covered by a general presumption of confidentiality.⁹

However, we are of the view that a refusal to disclose information cannot be justified in the present case on the basis of a general presumption of confidentiality and an assumption that infringement proceedings should be regarded “as a type of procedure which, as such, has characteristics precluding full transparency being granted in that field and which therefore has a special position within the system of access to documents.”¹⁰

We maintain that it is not possible to draw a comparison between infringement proceedings relating to alleged fundamental rights abuses and State aid review proceedings:¹¹ in the latter case the interest in disclosure, and so the exercise of the right to information, may clearly affect information pertaining to private entities and serving private interests; whereas in the former case the exercise of the right to information exclusively relates to the objective of raising awareness and providing public acknowledgement of alleged human rights abuses, with the ultimate view of advocating for the end of such violations.

In such circumstances, the interest in disclosure, which reflects the fundamental right to access to information may, in line with the jurisprudence described above, be disregarded only where relevant and sufficient reasons provided by the public authorities can justify a refusal to disclosure in the name of the protection of other legitimate and objective interests.

Therefore, **we firmly believe that the general presumption of confidentiality cannot apply in the present case; on the contrary, in cases such as the present circumstances the *onus* to provide specific reasons able to justify a refusal to make relevant information available should be placed on the public authorities.**

We maintain that the general reasons put forward by the Director-General to justify the refusal to disclose the requested documents are not sufficient to provide the necessary evidence of the extent to which the damage, if any, suffered by the public authority as a result of the disclosure in question

⁸ See, to that effect, the judgement of 10 July 2006, *Sdružení Jihočeské Matky v Czech Republic* (Application no. 19101/03). The case concerned a refusal to give an ecologist non-governmental organisation access to documents and plans regarding a nuclear power station. The ECtHR recognized that the refusal by public authorities was an interference with the right to receive information guaranteed by Article 10 ECHR. Therefore, a strict scrutiny was applied in order to check whether the refusal met the conditions set forth in Article 10 (2) (i.e. was justified in light of the conditions therein) and whether the access to information request actually reflected a matter of public interest.

⁹ Joined Cases C-514/11 P and C-605/11 P *Liga para a Protecção da Natureza (LPN), Republic of Finland v European Commission*, [2013] not yet published, paragraph 63 ff.

¹⁰ See *Liga para a Protecção da Natureza (LPN), Republic of Finland v European Commission*, mentioned above, paragraph 55.

¹¹ A general comparison between infringement proceedings and State aid review proceedings was drawn by the CJEU in *Liga para a Protecção da Natureza (LPN), Republic of Finland v European Commission*, mentioned above (see paragraph 56 ff.).

could outweigh the interest of the public in having the information revealed, as required by ECtHR jurisprudence.¹²

2) *On the existence of an overriding public interest in disclosure*

Should a general presumption of confidentiality be confirmed, or the general reasons provided by the Director-General be regarded, in principle, relevant to justify a refusal to disclose the information requested, **Amnesty International argues that access to the documents requested should still be granted given the existence of an overriding public interest justifying disclosure in the present case.**¹³

The CJEU has clarified that proving the existence of an “overriding public interest” within the meaning of the last phrase of Article 4(2) of Regulation No 1049/2001 requires interested parties to rely on appropriate and specific circumstances that allow establishing that, in that particular case, the principle of transparency is somehow especially pressing and therefore capable of prevailing over the reasons justifying the refusal to disclose the documents in question.

Amnesty International would like to point out that, **when a request for access to documents relates to on-going investigations on alleged serious and systematic violations of fundamental rights and is made by an organisation active in this field, as in the present case, an overriding public interest in disclosure should be regarded as intrinsic.**

To that effect, we refer to recent ECtHR case-law which indicates that the proportionality test aiming at assessing whether an interference with the right to access to information can be considered necessary and proportionate should be **particularly strict** when the aim of the access to information request is to gather information with a view to carrying out advocacy on matters of interest to the general public and when the request is made by a non-governmental organisation exercising a role as a “public watchdog”.¹⁴

Referring to the “censorial power of an information monopoly”, when public bodies refuse to release information to the media or civil society organisations necessary to perform their “watchdog” function, the ECtHR ruled that most careful scrutiny is called for when measures taken by the national authority could result in discouraging the participation of the society’s “watchdogs” in the public debate on matters of legitimate public concern. In this context, **particular attention should be paid to the public interest involved:** “in a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion”, to the effect that “the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.”¹⁵

Our organisation is of the opinion that the above reasoning is even more relevant where, as in the present case, the subject matter of the access to information request relate to alleged human rights violations. In these circumstances, the existence of a public interest is self-evident, so that a particularly strict proportionality test should be applied to check whether the reasons put forward by the

¹² See *Guja v Moldova*, mentioned above, paragraph 76, and the case-law cited.

¹³ According to the CJEU, interested parties always have the possibility of demonstrating that there is an overriding public interest justifying disclosure of the document concerned (see *Liga para a Protecção da Natureza (LPN), Republic of Finland v European Commission*, mentioned above, paragraph 20; see also, to that effect, Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 62; joined Cases C 514/07 P, C 528/07 P and C 532/07 P *Sweden and Others v API and Commission* [2010] ECR I 8533, paragraph 103; and Case C-477/10 P *Commission v Agrofert Holding* [2012] not yet published, paragraph 68).

¹⁴ See to that effect judgement of 12 February 2008, *Guja v Moldova* (Application no. 14277/04); judgement of 26 May 2009, *Kenedi v Hungary* (Application no. 31475/05); judgement of 14 July 2009, *Társaság a Szabadságjogokért (the Hungarian Civil Liberties Union) v Hungary* (Application no. 37374/05); judgement of 25 June 2013, *Youth Initiative For Human Rights v. Serbia* (Application no. 48135/06).

¹⁵ See *Guja v Moldova*, mentioned above, paragraph 74, and the case-law cited.

public authorities to justify a refusal to disclose information are relevant and sufficient to allow this degree of interference with the right to receive information, which also affect the exercise by the applicants of their role of “public watchdogs”. **Therefore the threshold for limitations on access to information should be considerably higher given the relative weight and importance to society of human rights related concerns.**

3) *On the need for the Commission to carry out an individual examination for each document concerned*

In any case, **Amnesty International argues that the Commission, given the importance of the subject-matter of the access to documents request in the present case, should carry out an individual examination of each of the documents concerned.**

This exercise would allow the Commission to check and provide more detailed explanations as to how total or partial access to each of those documents might actually undermine the purpose of the investigation.

This appears in line with the principle, set forth by the CJEU, according to which exceptions to the general principle of transparency, frustrating the achievement of the objective of the widest possible public access to documents, must be interpreted and applied strictly.¹⁶ According to this principle, institutions which decide to refuse access to a document which it has been asked to disclose “should explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those laid down in Article 4 of Regulation No 1049/2001 – upon which it is relying.”¹⁷

The CJEU has already clarified that even where there seems to be a general presumption on the confidentiality of certain categories of documents, the Commission is not required to base its decision on that general presumption, as it “may decide to carry out a specific examination of the documents covered by a request for access”. According to the CJEU, were the Commission to find on the basis of such an examination that the infringement procedure involved in a given request for access were of a nature which permits the full or partial disclosure of the documents in the file, the Commission would be obliged to make that disclosure.¹⁸

In that respect, we argue that, for example, documents falling under point 2, first indent of our request (i.e. the internal assessment of DG Justice from March 2012, the assessment requested by DG Justice from the European Network of Legal Experts in the Non-discrimination field and the reply received from the Network in February 2013 and DG Justice’s internal assessment on the follow-up to the file) should, as a result of such specific and individual assessment, be regarded in the present case as permitting disclosure.

¹⁶ See to that effect joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 33.

¹⁷ See joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraphs 70 to 73 and the case-law cited.

¹⁸ See to that effect *Liga para a Protecção da Natureza (LPN), Republic of Finland v European Commission*, paragraphs 67-68.

In light of all the above, Amnesty International:

- **Asks the Secretary-General to review the position expressed by the Director-General in her letter of 6 February 2014 thus granting our organisation access to all the documents requested.**
- Should a general presumption of confidentiality apply, or the general reasons provided by the Director-General be regarded, in principle, relevant to justify a refusal to disclose the information requested, and should the existence of an overriding public interest justifying the disclosure not be confirmed, **we ask the Secretary-General, given the importance of the subject-matter of the access to documents request in the present case, to carry out an individual examination of each of the documents concerned**, in order to check and provide detailed explanations as to how total or partial access to each of those documents might actually undermine the purpose of the investigation.

In submitting this confirmatory application, Amnesty International would like to recall that, as recognised by the Council of Europe¹⁹, the right of access to official documents has to be regarded as crucial in the promotion of democratic accountability and participation and as essential to the self-development of people and to the exercise of human rights.²⁰ It also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them, as transparency of public authorities is a key feature of good governance.

In line with the position recently supported by the European Parliament, our organisation believes that the practice of refusing fair access to information about pre-litigation stage of infringement proceedings to citizens and stakeholders "is contrary to the principles of good governance which the EU has been promoting actively [...]; contrary to openness, participation, accountability, effectiveness and coherence"²¹, and it may thus constitute a prejudice to the right to good administration protected by Article 41 CFR.

With specific reference to the present case, we maintain that the lack in access to documents, given the high stake of the subject-matter as well as the considerable length of the pending investigations carried out by the Commission, is clearly at odds with the *rationale* behind the exercise of the right to access to information, and thus also affecting the right of good administration to which our organisations and those in the name of whom we take action are entitled; it also frustrates the role of our organization as "public watchdogs" with regards to alleged human rights violations, hampering an informed public debate on the issues concerned.

¹⁹ See summary to the Council of Europe Convention of 18 June 2009 on access to official documents, mentioned above, available at <http://conventions.coe.int/Treaty/EN/Summaries/Html/205.htm>.

²⁰ In this regard, the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression has expressed since long ago its concern "about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs in that the decisions of Governments, and the implementation of policies by public institutions, have a direct and often immediate impact on their lives and may not be undertaken without their informed consent" (Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain, UN Doc. E/CN.4/2000/63, 18 January 2000, paragraph 43).

²¹ European Parliament, Directorate-General for Internal Policies, 2013 Study on "Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness", available at [http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2013/493014/IPOL-JURI_ET\(2013\)493014_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2013/493014/IPOL-JURI_ET(2013)493014_EN.pdf), p. 84. See also the European Parliament's draft report on the 29th annual report on monitoring the application of EU Law (2011), 2013/2119(INI).