To the President and Members of the General Court

of the European Union

Reply of Applicants

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(1) ClientEarth

(2) Transport & Environment

(3) European Environmental Bureau

(4) BirdLife International

Applicants

v.

European Commission

Defendant

Date of Lodging:
31 August 2010

Addressee:
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INTRODUCTION

1. In its Defence, the European Commission advances legal principles that threaten to undermine administrative practice, legislative prerogative, and judicial review. With this Reply, Applicants clarify for the Court the relevant facts in the record. Applicants will also highlight fundamental issues requiring adjudication.

2. This action is neither devoid of purpose nor legal consequences simply because the Commission disclosed some more documents after the date of lodging. Although the protracted delay in releasing those documents is unfortunate and erodes public confidence in the Commission, those documents do not require further judicial time and resources. But the only way for the Commission to rob this action of legal consequences is to release *all* documents falling within the scope of the 15 October 2009 Application, not just a few. This the Commission has not done.

3. There are two fundamental issues of law that require adjudication. First, the Court must rule on the admissibility of newfound claims to exception made long after the two-stage administrative procedure and lodging of this action. Applicants argue that the reasons for refusal of a document must be stated in a written reply *during* the two-stage administrative procedure or be waived as claims to exception or defences at law and otherwise fall outside the scope of judicial review. Second, the Court should rule on whether the public interest in compliance with the time limits as set out in Articles 7 and 8 of the Public Access Regulation is an overriding public interest compelling mandatory disclosure of those documents for which no claims to exception are made during the two-stage administrative procedure.

4. There is also another fundamental issue related to missing documents that requires adjudication. In a letter sent to Applicants one working day before the time limit to lodge its Defence, the Commission claimed that 140 documents fell within the scope of the 15 October 2009 Application. This statement contradicts previous statements made during the course of the two-stage administrative procedure where the Commission identified around 200 documents as falling within the scope of the 15 October 2009 Application. The 60 missing documents, the reasons for their sudden exclusion, and the inappropriate exclusion of any other responsive documents are squarely at issue here.

5. Environmental policy making has wide implications for people and the environment. On climate issues, the actions taken today will determine the quality of life for all living creatures now and in the future. There is no reset button. Future generations will have to live with our choices today, for better or worse. The public plays a critical role in ensuring public authorities strike the right balance, make the right decisions, and base those decisions on the right information. In the case at issue, those decisions concern known instances of unaccounted greenhouse gas (GHG) emissions undermining renewable policies and promoting destructive biofuels. The EU legislature has repeatedly reaffirmed the essential importance of providing access to information, public participation in decision making, and access to justice in environmental matters. And that is what this case is about: the principles of transparency and openness applicable to EU institutions.

SUPPLEMENTAL FACTUAL BACKGROUND

6. The Application provides an extensive review of the factual background forming the basis of this action.[1] In its Defence, the Commission does not dispute the facts as presented by Applicants. For convenience of the Court, Applicants supplement the factual background with the following additional facts.

7. On 2 July 2010, one working day before the time limit for lodging a defence in this action, the Commission sent a letter via electronic mail to Applicants (hereinafter "2 July 2010 Letter").[2] The 2 July 2010 Letter notified Applicants that 39 additional documents would be released. The Commission subsequently provided access to those documents. The 2 July 2010 Letter also made, for the first time, newfound claims to exceptions for 24 documents and redacted portions of 2 others. In addition to newfound claims to exceptions, the Commission further stated that it found no overriding public interest in disclosure for those documents for which an overriding public interest would otherwise compel disclosure. Neither the claims to exceptions nor the lack of an overriding public interest were ever made orally or in writing during the two-stage administrative procedure. The 2 July 2010 Letter included a list of documents and is attached hereto as Annex C.1.

8. The 2 July 2010 Letter also reduced, without explanation or justification, the scope of the documents covered under the original request from around 200 to 140. The Commission

[1] Applicants Application, paragraphs 11-29.
[2] Commission Defence, Annexe B.1.

stated in its 9 February 2010 Refusal Letter that it had "identified around 200 documents which fall within the scope of your request and we have made progress with the concrete analysis of a number of them."[3] Then, in its 2 July 2010 Letter, the Commission states that, "[o]n the basis of your application [the Commission has] identified 140 documents as falling within the scope of your request."[4] At no point did the Commission provide a list of the documents that were excluded or the basis for their exclusion. The 60 missing documents form part of these proceedings. For convenience of the Court, a chronology of relevant correspondence between Applicants and the Commission is attached hereto as Annex C.2 and a schedule of illustrative documentation is attached hereto as Annex C.3.

ARGUMENT

9. All parties agree that this action must be capable of having legal consequences to compel judicial review. The Commission argues that, first, it made no decision capable of being the object of annulment on the date of lodging and, in the alternative, this action is now devoid of legal consequences. Both these arguments violate applicable law and should be rejected.

Applicants Had an Interest in Initiating Court Proceedings on the Date of Lodging

10. The Commission requests dismissal arguing this action was premature. According to the Commission, "there was, at the moment of lodging the present proceedings, namely 8 March 2010, no implied negative decision refusing access to documents in the sense of Article 8(3) of Regulation 1049/2001 which could be the object of an annulment action pursuant to Article 263 [of the Treaty on the Functioning of the European Union]."[5] The Commission further alleges "that, on 8 March 2010, the date of lodging the Application at the Court, the Applicant had no interest in bringing proceedings there being no implied decision with regard to the remaining documents since the Applicant had been assured by the Commission that an express decision with regard to those documents would be adopted within the shortest possible delay."[6]

[3] Applicants Application, Annex A.9, p. 55.
[4] Commission Defence, Annexe B.1.
[5] Commission Defence, paragraph 7.
[6] Commission Defence, paragraph 9.

11. For the record, exactly 130 days passed between the 2 July 2010 Letter and the 22 February 2010 Partial Release Letter, where the Commission stated it would reply on the remaining documents "within the shortest possible delay."[7]

12. In support of its argument, the Commission refers to *Shaw and Falla v. Commission*.[8] That case stands for the simple proposition that "the conditions governing admissibility of an action must be judged, subject to the separate question of the loss of an interest in bringing proceedings, at the time when the application is lodged."[9] The conditions governing admissibility of this action are therefore judged at the time the application was lodged. This action was lodged on 8 March 2010.

13. Under Article 8 of the Public Access Regulation, failure to release the documents or state the reasons for refusal by the statutory time limit constitutes a negative reply:

> "A confirmatory shall be handled promptly. Within 15 working days from registration of such application [with an additional 15 working days in exceptional cases], the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman...
>
> Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution...."

Article 8 provides only two options to EU institutions: make the documents available or provide the reasons for total or partial denial in writing. The statutory time limit for the Commission decision is 60 working days from the original application—in the instance of

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[7] Applicants Application, Annex 10.
[8] Case T-131/99, *Shaw and Fall v. Commission* [2004] ECR, p.II-2023; *see* Commission Defence, paragraph 8.
[9] Case T-131/99, *Shaw and Fall v. Commission* [2004] ECR, p.II-2023, para. 29, *citing Case 50/84 Bensider and Others v. Commission* [1984] ECR 3991, paragraph 8.

exceptional cases resulting in multiple extensions—after which a definitive negative reply is deemed to exist under statute. This ensures the prompt processing of applications.

14. In *Internationaler Hilfsfonds v. Commission*, the Court of Justice described the aims of the two-stage administrative process:

> "With regard to Regulation No 1049/2001, it should be pointed out that Articles 7 and 8 of that regulation, by providing for a two-stage procedure, aim to achieve, first, the swift and straightforward processing of applications for access to documents of the institutions concerned and, second, as a priority, a friendly settlement of disputes which may arise. For cases in which such a dispute cannot be resolved by the parties, the abovementioned Article 8(1) provides two remedies, namely the institution of court proceedings or the lodging of a complaint with the Ombudsman.
>
> That procedure, in so far as it provides for the making of the confirmatory application enables in particular the institution concerned to re-examine its position before taking a definitive refusal decision which could be the subject of an action before the courts of the Union. Such a procedure makes it possible to process initial applications more promptly and, consequently, more often than not to meet the applicant's expectations, while also enabling the institution to adopt a detailed position before definitively refusing access to the documents sought by the applicant, in particular where the applicant reiterates the request for disclosure of those documents notwithstanding a reasoned refusal by that institution."[10]

15. At the time of lodging of this application, on 8 March 2010, and despite the 22 February 2010 Partial Release Letter and 24 February 2010 Email, the Commission was withholding 123 documents without having offered any valid reasons to justify their nondisclosure under the Public Access Regulation.[11] This action is therefore *de jure* admissible.

16. Nor should the Commission be allowed to claim the contrary now. In the 9 February 2010 Refusal Letter, the Commission rejected the confirmatory application by not disclosing the

[10] Case 362/08 P, *Internationaler Hilfsfonds v. Commission* [2010]; *see also* Applicants Application, paragraphs 30-51.
[11] *See* Applicants Application, Annex A.10.

documents or offering valid reasons for their nondisclosure, informing Applicants of their right to initiate proceedings before the General Court of the European Union:

> "We are aware that the extended time limit for handling your application expires today. However, as indicated in our previous letter, we have not completed the analysis of the requested documents and are, therefore, not in a position to take a final decision on your application for access. Formally, you are entitled to bring proceedings to the General Court of the EU or to lodge a complaint to the European Ombudsman."

Now, in these proceedings—after having acknowledged Applicants' entitlement to bring this action—the Commission argues that there existed no decision that could form the object of an annulment action. This argument should be rejected.

This Action Has Legal Consequences

17. The Commission argues, in the alternative, that this action has become devoid of purpose. The basis for this claim is the so-called "express decision" the Commission communicated to Applicants in its 2 July 2010 Letter—143 days after expiration of statutory time limit for responding and 1 working day before the time limit fixed for lodging the defence—which made newfound claims to exception outside the two-stage administrative procedure. The Commission argues that this "express decision" annuls its original refusal, depriving Applicants' action of legal consequences.[12]

18. The Commission refers to the unreported case, *Williams v. Commission*, for the proposition that Applicant has no interest in the annulment of its "implied refusal" on 9 February 2010. The case upon which the Commission relies, however, does not support the proposition for which it is advanced. This case confirms Applicants actionable interest here. In *Williams v. Commission*, the court found that the applicant's second plea in law was devoid of purpose because it related to 5 documents that were *outside the scope* of the contested decision. Those documents, the court found, did not fall under the scope of applicant's request for "documents concerning the background to the adoption of Directive 2001/18."[13] Several

[12] Commission Defence, paragraphs 10-11.
[13] Case T-42/05, *Williams v. Commission*, judgment of 10 September 2008, unreported, paragraph 112

documents actually post-dated adoption of Directive 2001/18.[14] The court therefore concluded, by virtue of being outside the scope of the contested decision, annulment would not give rise to enforcement measures.[15] The court dismissed the second plea as inadmissible.

19. Here, the Commission is currently withholding 84 documents and redacted portions of 2 others that fall *within the scope* of the original request and the contested decision: the 15 October 2009 Application and the 9 February 2010 Refusal Letter. The 22 February 2010 Partial Release Letter, the 24 February 2010 Email, and the 2 July 2010 Letter, while releasing some documents, do not render unchallengeable the remaining 84 documents and redacted portions of 2 others that fall within the scope of the request.

20. In its 2 July 2010 Letter, the Commission also invokes, for the first time, the Article 4(2) exception protecting commercial interests for 22 of the 84 withheld documents. It argues, *inter alia*, that these documents contain results from studies that "were not designed for public dissemination" despite being commissioned by a public institution with public moneys to make public policy. The Commission also offers, for the first time, reasons why it considers that there is no overriding public interest in disclosure, arguing that the public interest in reducing greenhouse-gas (GHG) emissions and ensuring that biofuel policies do not destroy forests and other natural areas are not "linked to the content of the requested documents." In order to fall within the scope of the initial request, however, the content of the requested documents must contain analysis and communications regarding GHG emissions associated with biofuel policies and their impact on forests and other natural areas. In addition to being inadmissible, this particular claim to the Article 4(2) exception is groundless as discussed *infra* at paragraphs 57-61.

21. In its 2 July 2010 Letter, the Commission also invokes, for the first time, the Article 4(1)(a) exception protecting international relations for 2 of the 84 withheld documents and redacted portions of 2 others. One document concerns a communication from Canada to the European Union. Another document and the redacted portions of 2 others contain preliminary results produced by the Organisation for Economic Co-operation and Development. In addition to being inadmissible, the basis for this particular claim to the Article 4(1)(a) exception is speculative and unsupported.

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[14] Case T-42/05, *Williams v. Commission*, judgment of 10 September 2008, unreported, paragraphs 111-112.
[15] Case T-42/05, *Williams v. Commission*, judgment of 10 September 2008, unreported, paragraphs 115-116.

22. In addition to the documents identified above, the Commission is withholding approximately 60 additional documents that fall within the scope of the request without any justification whatsoever. In its 9 February 2010 Refusal Letter, the Commission stated that it had "now identified around 200 documents which fall within the scope of [Applicants'] request,"[16] likely including several email communications qualifying as "documents" and "environmental information" as defined in the Public Access and Aarhus Regulations.[17] Then, in the 2 July 2010 Letter, the Commission states that it "identified 140 documents as falling within the scope of [Applicants'] request."[18] The reasons for this 60-document discrepancy, the right to know its basis, and any inappropriate exclusion are squarely at issue in this case.

23. In *Williams v. Commission*, the General Court outlined the three-part test for admissibility of an action for annulment: (i) the applicant has an interest in seeing the contested measure annulled; (ii) annulment of the measure must of itself be capable of having legal consequences; and (iii) the action must be likely, if successful, to procure an advantage for the party that brought it.[19] Applicants meet this test.

24. As an initial matter, as noted above, Applicants concede that claims regarding documents released following the lodging of the application do not require adjudication. The protracted delay in releasing those documents is unfortunate and undermines public confidence in the Commission, but those documents do not require further judicial time and resources. Issues related to those specific documents are moot. At the time of submission of this Reply, however, the Commission is currently withholding 84 documents and redacted portions of 2 others in violation of the law.[20] Those documents are at issue in these proceedings.

25. With respect to the first part, Applicants have an interest in seeing the contested measure annulled. The 9 February 2010 Refusal Letter withheld around 200 documents containing critical information regarding environmental impacts of EU biofuel policies. Those documents, by the Commission's own admission, fell within the scope of the 15 October

[16] Applicants Application, Annex A.9.
[17] Regulation (EC) No 1049/2001, Article 3(a); Regulation (EC) No 1367/2006, Article 2(d).
[18] Commission Defence, Annexe B.1.
[19] Case T-42/05, *Williams v. Commission*, judgment of 10 September 2008, unreported, paragraph 114.
[20] Commission Defence, Annex B.1.

2009 Application. Withholding those documents violates Applicants' rights. Reasons invoked outside the two-stage administrative procedure are inadmissible.[21]

26. With respect to the second part, annulling the 9 February 2010 Refusal Letter has legal consequences. This includes, *inter alia*, findings on the number of documents falling under the scope of the original request and the admissibility of claims to exception made outside the two-stage administrative procedure. Those findings will have legal consequences for rulings on each plea in law pled in the Application: (i) failure to provide timely disclosure of documents or reasons for withholding; (ii) failure to provide detailed reasons for withholding each document; (iii) failure to carry out a concrete, individual assessment of the content of each document; (iv) unlawful application of the Article 4(3) exception; (v) failure to redact documents; and (vi) failure to identify the period of application of the Article 4(3) exception.[22]

27. Indeed, contrary to the Commission's assertions, *Williams v. Commission* confirms the legal consequences at stake in this action. In addressing the first plea in law, the *Williams* court found that the express or implied refusal of access to documents falling within the scope of the request without stating reasons represented "an absolute failure to state reasons."[23] It further found that, despite newfound arguments raised during the judicial proceedings, the Commission "cannot remedy [its] failure to state reasons."[24] The court therefore allowed the application for annulment of the contested decision. So too should the Court here.

28. With respect to the third part, a favourable decision will procure an advantage to Applicants. Here, those advantages include, *inter alia*, release of documents containing information on environmental policy making, including the 60 missing documents and other electronic mail communications that may have been inappropriately excluded, and judicial findings on administrative legal principles protecting the right of access in the Public Access and Aarhus Regulations, which are relevant to Applicants as non-profit public-interest organisations that rely on access to documents in order to influence environmental policy making.

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[21] *See* Applicants Application, paragraphs 30-52.
[22] Applicants Application, paragraphs 53-92.
[23] Case T-42/05, *Williams v. Commission*, judgment of 10 September 2008, unreported, para. 96.
[24] Case T-42/05, *Williams v. Commission*, judgment of 10 September 2008, unreported, para. 96 *citing* Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others v. Commission* [1996] ECR I-5151, para. 48, and Case T-318/00 *Freistaat Thüringen v. Commission* [2005] ECR II-4179, paragraph 127; *see* Applicants Application, paragraphs 53-64.

Newfound Claims to Exception Are Inadmissible

29. Allowing newfound claims to exception violates fundamental principles of administrative law. The Commission provided neither the documents nor a written reply with detailed and valid reasons for withholding the documents during the two-stage administrative procedure. Applicants have shown that the institution must state its reasons for refusal in a written reply *during* the two-stage administrative procedure, not after.[25] This serves several purposes, which are identified in the Application.[26]

30. Further, the Commission's arguments violate well-settled jurisprudence of the Court of Justice in judicial-review cases: explanations given by the Commission during the legal proceedings may not remedy insufficiencies in the statement of reasons in the contested decision.[27] Fundamental principles of administrative law, in general, and the two-stage administrative procedure, in particular, require those reasons be stated during the administrative process or be waived.

Compliance with Statutory Time Limits Is an Overriding Public Interest

31. In adopting the two-stage administrative procedure, the EU legislature struck a balance between the public interest in prompt resolution of requests for access to documents and the time requirements necessary to conduct a thorough administrative review. Articles 7 and 8 of the Public Access Regulation state that applications and confirmatory applications "shall be handled promptly" and a reply shall be given no later than 15 working days.[28] In exceptional cases, the institution may delay its replies by 15 working days for a total of 30 additional working days from the date the original application is registered. That means, for any given request, the Commission has a maximum of 60 working days to respond. Failure to respond within the statutory time limit constitutes a negative reply, perfecting the right of the requestor to seek redress.[29] The Commission cannot unsettle, through its administrative practice or in the course of these proceedings, this balance struck by the EU legislature.

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[25] Applicants Application, paragraphs 30-41.
[26] Applicants Application, paragraphs 30-41.
[27] Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v. *Commission* [1996] ECR I-5151, paras. 47-48; Case T-318/00 *Freistaat Thüringen* v. *Commission* [2005] ECR II-4179, paragraph 127; Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraphs 116 to 119; Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-0000, paragraphs 123-126.
[28] Regulation (EC) No 1049/2001, Articles 7(1)-(3) and 8(1)-(3).
[29] Regulation (EC) No 1049/2001, Articles 7(4) and 8(3).

32. Where, as here, no claims to exception have been made during the two-stage administrative procedure, and an overriding public interest otherwise defeats a valid claim to exception, the Commission should be required to provide immediate access to the documents upon expiration of the two-stage administrative procedure. In other words, compliance with the statutory time limit for providing access or written replies is an overriding public interest compelling immediate disclosure where no exception is claimed. There are several reasons supporting this conclusion.

33. First, granting timely access to information early enough in the decision making process is a *sine qua non* condition to give full effect to the right of access. Access to information and public participation "increas[e] accountability and transparency of decision making and contribut[e] to public awareness and support for the decisions taken."[30] Indeed, according to the Court of Justice, "the provisions of the legislative act must be applied in light of the principles underlying it."[31] The Commission has engaged, however, in a pattern and practice of maladministration despite strict procedural protections. The text of the statutes and the principles underlying it do not provide for such abuse. In so behaving, the Commission renders obsolete these pillars of the Public Access and Aarhus Regulations, compelling a judicial response.[32]

34. Second, to rule otherwise would place an undue burden on the exercise of a public right. Stating the reasons in written form provides the applicant with the ability to secure counsel to review the legal merits of the refusal and, if necessary, initiate court proceedings or make a complaint to the Ombudsman, as circumstances may require. In the absence of any claims to exception, however, the institution has no basis for withholding the requested documents. Those documents should therefore be released immediately, upon failing to invoke a claim to exception, lest the applicant and judiciary squander scarce time and resources on counsel and judicial review due to Commission maladministration.

35. Third, the Public Access Regulation already accounts for potential administrative burden, outlining the recourse available to the Commission in these exceptional cases. In the event an

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[30] Regulation (EC) No 1367/2006, Recital 2.
[31] Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008), paragraph 75.
[32] Regulation (EC) No 1367/2006, Recital 5.

application relates to a "very long document or a large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution."[33] In addition, "[i]n exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided... may be extended by 15 working days."[34] Since the time limit may be extended by 15 working days during both the application and confirmatory-application stages, the Commission is afforded an additional 30 working days on top of the 30 working days normally provided for a maximum of 60 working days to respond to any given request.

36. Therefore, the two-stage administrative procedure should ensure timely access to information, which is evidenced in both text and spirit of the Public Access and Aarhus Regulations. The purpose of the Public Access Regulation is "to define the principles, conditions and limits on grounds... governing the right of access," "to establish rules ensuring the easiest possible exercise of this right," and "to promote good administrative practice on access to documents."[35] The Public Access Regulation has an overall objective to give effect to the "right of public access to documents."[36] The Aarhus Regulation goes even further in "guaranteeing the right of public access to environmental information."[37] The two-stage administrative procedure and additional possibility of court proceedings have the explicit purpose of "ensur[ing] that the right of access is fully respected."[38] For environmental information relating to emissions in the environment, as here, this right is bolstered: "the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information relates to emissions into the environment."[39]

37. The public interest in compliance with statutory time limits enshrined in the Public Access and Aarhus Regulations constitutes an overriding public interest compelling immediate release of the requested documents within the statutory time limit unless a valid claim to exception is otherwise made *during* the two-stage administrative procedure.[40]

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[33] Regulation (EC) No 1049/2001, Article 6(3).
[34] Regulation (EC) No 1049/2001, Articles 7(3) and 8(2).
[35] Regulation (EC) No 1049/2001, Article 1(a)-(c).
[36] Regulation (EC) No 1049/2001, Recital 4; *see also* Regulation (EC) No 1049/2001, Article 1(a); Aarhus Regulation, Article 1(a).
[37] Regulation (EC) No 1367/2006, Article 1(a).
[38] Regulation (EC) No 1049/2001, Recital 13; *see also* Public Access Regulation, Articles 6-8.
[39] Aarhus Regulation, Article 6(1).
[40] Regulation (EC) No 1049/2001, Article 4(2)-(3).

Commission Maladministration Is Capable of Repetition

38. The Commission's pattern and practice of maladministration is well-documented.[41] Legitimizing eleventh-hour communications is against the interests of justice and—without protective findings—capable of repetition. Judicial endorsement of maladministration would undermine the effectiveness of the Public Access and Aarhus Regulations.[42] Without a decision here, this maladministration can be revisited upon Applicants. Indeed, it already has.

39. On 2 April 2010, Applicants submitted an application to the Commission's Directorate-General for Trade (DG Trade) requesting access to documents under the Public Access and Aarhus Regulations. The application detailed several documents for disclosure:

> "[S]pecifically, we request all documents mentioning, discussing, analyzing or describing the following:
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> - drafts of the above-identified report, "Global Trade and Environmental Impact of the EU Biofuels Mandate" by the International Food Policy Research Institute, which was finalised on 25 March 2010, including those documents analysing the 7% scenario and its associated impacts on land use change; and
> - all communications, including emails from the Directorate-Generals and third parties, that resulted in the decision to settle on the currently estimated volume of 5.6% of road transport fuels in 2020 to meet the 10% renewable energy mandate by 2020.
>
> This request is intended to secure all documents created after 15 October 2009 for the above-mentioned report, which is the date that Applicants submitted the previous application for similar documents. It is our view that all pre-15 October 2009 documents relating to the report were requested in our 15 October 2009 application. Nevertheless, to the extent the Commission has determined that certain pre-15 October 2009 documents—as that term is expansively defined—do not to fall within the purview of our

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[41] Applicants Application, paragraphs 27-29.

[42] *See* Case T-42/05, *Williams v. Commission*, judgment of 10 September 2008, unreported, para. 96 *citing* Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others v. Commission* [1996] ECR I-5151, para. 48, and Case T-318/00 *Freistaat Thüringen v. Commission* [2005] ECR II-4179, para. 127; *see* Applicants' Application, paras. 53-64.

> 15 October 2009 application, such as emails from DGs and industry, internal correspondence, or any other document, we request that those documents be made available too."

The Commission registered the application four days later. This application is hereinafter referred to as the "2 April 2010 Application" and is attached hereto as Annex C.4.

40. On 27 April 2010, DG Trade responded granting itself an additional 15 working days to comply with the request. It referred to "the number of documents applied for" to explain the delay.[43] This document is hereinafter referred to as the "27 April 2010 Extension Email" and is attached hereto as Annex C.5.

41. During consideration of the 2 April 2010 Application, the Commission did not claim that the application was insufficiently precise, that clarification on the request was needed, or that the application was deficient in any other way. Further, the Commission did not seek to confer informally with Applicants with a view toward finding an alternative solution.

42. Upon expiration of the time extension providing an additional 15 working days to respond, the Commission remained silent, which resulted in a statutory negative reply.[44]

43. On 8 June 2010, Applicants submitted a confirmatory application to the Secretary-General of the Commission outlining in explicit terms the Commission's legal obligations and requesting a reversal of DG Trade's inaction. The confirmatory application was registered the same day. The confirmatory application is hereinafter referred to as the "8 June 2010 Confirmatory Application" and is attached hereto as Annex C.6.

44. On 29 June 2010, the Commission responded to the 8 June 2010 Confirmatory Application, granting itself an additional 15 working days to comply under Article 8(2) of the Public Access Regulation. It cited "the complexity of the issue and the need to consult all the involved internal services" as the reasons for the delay.[45] This document is hereinafter referred to as the "29 June 2010 Extension Letter" and is attached hereto as Annex C.7. For

[43] Annex A.2, p. 2.
[44] Public Access Regulation, Article 7(4).
[45] Annex A.6, p. 47.

the record, the reasons for granting the time extension in the 29 June 2010 Extension Letter are identical to those offered on the 17 December 2009 Confirmatory Application.[46]

45. On 19 July 2010, the Commission informed the Applicants in a letter that it would be unable to disclose the documents within the statutorily prescribed time limit, which expired on 20 July 2010. It cited as the reasons for its inability to comply: "required analysis of the documents and the consultation with the third party concerned... as well as the internal consultations take more time than usual." It finished by stating that it aimed to send a reply "within the shortest possible time limit." This document is hereinafter referred to as the "19 July 2010 Letter" and is attached hereto as Annex C.8.

46. At the time of lodging this Reply, the Commission has neither disclosed any documents nor responded in any other way in response to the 2 April 2010 Application.

47. As noted in the Application, the Commission's pattern of disregarding its obligation to respond promptly and lawfully to requests for access to documents has been well-documented by the European Ombudsman.[47]

48. The Commission has a long history of maladministration. As has been shown, this maladministration is not only capable of repetition but has already been repeated with Applicants and third parties. Judicial findings compelling the immediate release of all requested documents identified in the course of the Commission's review of 15 October 2009 Application and the 17 December 2009 Confirmatory Application, in addition to all documents generated during the consideration thereof, without delay or redaction, would begin to remedy this ongoing violation of rights. In addition, this case compels protective judicial findings in response to the pattern and practice of maladministration in repeatedly violating the time limits set out in Articles 7 and 8 of the Public Access Regulation.

Requiring Applicants to Re-lodge or Amend Would Result in a Gross Injustice

49. In its Defence, the Commission advances the notion that Applicants should challenge its so-called "express decision" by "either lodging a new application or by way of amendment of

[46] Applicants Application, para. 17.
[47] *Decision of the European Ombudsman closing the inquiry on complaint 1010/2008/(AL)DK against the European Commission*, paragraphs 26, 32-33; *see also* Applicants Application, paras. 27-29.

[their] application in the context of the present proceedings if [they] request and obtain[] permission from the Court to amend [their] pleas in law."[48] This notion should be rejected outright. Additional delay hinders Applicants' ability to engage in policy making and the newfound claims to exception are unavailable to the Commission as a matter of law.

I. Additional Delay Hinders Applicants' Ability to Engage in Policy Making

50. Delaying further this request for access to documents hinders Applicants' ability to engage in policy making in environmental matters, namely renewable energy strategies, biofuel policies, indirect land-use change, and GHG emissions.

51. In April 2009, on the same day, the EU legislature adopted the Renewable Energy and Fuel Quality Directives to reduce GHG emissions and promote renewable energy.[49] The Renewable Energy Directive requires Member States to use renewable energy sources to meet 10% of their transport needs by 2020.[50] The Fuel Quality Directive requires a 6% reduction in lifecycle GHG emissions from fuels consumed in the Union by 2020.[51] These targets will be met through the increased use of biofuels.[52] In recognition of the potentially detrimental effect that biofuel policies may have on GHG emissions and biodiversity, the EU legislature required "clear rules for the calculation of greenhouse gas emissions from biofuels and bioliquids and their fossil fuel comparators."[53]

52. The EU legislature deferred adopting rules on calculating GHG emissions from biofuels and bioliquids to a later date pending additional analysis. As a result, the Renewable Energy and Fuel Quality Directives contain a two-fold mandate to the Commission: first submit a report "reviewing the impact of indirect land-use change on greenhouse gas emissions and

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[48] Commission Defence, para. 6.
[49] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2001 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, Recitals 1-2 [also referred to as the "Renewable Energy Directive"]; Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC, Recitals 1-4 [also referred to as the "Fuel Quality Directive"].
[50] Directive 2009/28/EC, Article 3(4).
[51] *See* Directive 2009/30/EC.
[52] COD/2008/0016.
[53] Directive 2009/28/EC, Recital 80.

addressing ways to minimise that impact" and, if appropriate, submit a proposal. The deadline for the Commission to submit the report and proposal is 31 December 2010.[54]

53. The requested documents relate to GHG emissions associated with indirect land-use change caused by biofuel policies. This is the subject of the report and the issue that the accompanying legislative proposal should be designed to resolve. In order to obtain information necessary for meaningful participation in policy making on biofuels, on 15 October 2009, more than 14 months before expiry of the 31 December 2010 deadline to submit the report and accompanying legislative proposal, Applicants requested documents related to biofuels modelling and relevant correspondence to ensure, *inter alia*, that the science is not being conformed to the policy but instead that the policy conforms to the science. The Commission responded with endless delays, which continue to this day.

54. Exactly 320 days have passed between the 15 October 2009 Application requesting access to documents and the lodging of this Reply.

55. Exactly 260 days have passed between the 15 October 2009 Application requesting access to documents and the 2 July 2010 Letter.

56. Exactly 203 days have passed between the contested decision, the 9 February 2010 Refusal Letter, which was sent to Applicants on the same date as the statutory time limit for responding to Applicants' request expired, and the lodging of this Reply. Any additional delay further frustrates Applicants' ability to engage in environmental policy making.

II. The Commission's Newfound Claims to Exception Are Groundless

57. For the vast majority of the documents at issue, the Commission makes claims to exception that are simply unavailable as a matter of law. In essence, the Commission is requesting the Court to compel Applicants to lodge another application or amend the existing one to challenge *groundless* claims to exception that will be summarily rejected.

58. In its 2 July 2010 Letter, the Commission invokes, for the first time, the Article 4(2), first indent, exception protecting commercial interests for 22 documents. This claim to exception

[54] Directive 2009/28/EC, Article 19(6).

may be defeated if there is an overriding public interest in disclosure.[55] The Commission claims that no such overriding public interest exists.

59. Under the Aarhus Regulation, however, an overriding public interest in disclosure is *deemed to exist* where, as here, the information relates to emissions in the environment:

> "As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations in particular those concerning possible infringements of [Union] law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment."

This is further supported by the Aarhus Convention, binding on EU institutions under Article 216(2) of the Treaty on the Functioning of the European Union, which acknowledges that public authorities hold environmental information in the public interest.[56]

60. The Commission has not disputed—nor can it—that the requested information relates to emissions in the environment. On the contrary, in its 27 November 2009 Refusal Letter, the Commission acknowledges that "the subject matter of the request relates to emissions in the environment."[57] An overriding public interest in disclosure is deemed to exist under the law.[58] Additional delay to adjudicate groundless claims to exception should be flatly rejected.

61. In addition, there are 60 missing documents for which the Commission offers no claims to exception whatsoever, a figure likely to be much larger if all electronic mail and other internal communications are included within the scope of the request. It would result in further injustice to require Applicants to challenge those 60 missing documents, in addition to unidentified others, with identical pleas in law, namely failure to make valid claims to exception during the two-stage administrative procedure. Indeed, in this action, Applicants seek measures of organisation of procedure and inquiry to determine whether any improper exclusionary practices resulted in the improper elimination of documents otherwise falling within the scope of the 15 October 2009 Application.

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[55] Regulation (EC) No 1049/2001, Article 4(2).
[56] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, Article 1.
[57] Applicants Application, Annex A.3, p. 5.
[58] Aarhus Regulation, Article 6(1).

62. Further, to the extent any claim to exception is deemed admissible, contrary to the arguments herein and without prejudice to their rights to appeal, Applicants seek to have this Court review the relevant documents to ensure proper application of the Public Access and Aarhus Regulations.

FORM OF ORDER SOUGHT

For the reasons outlined above, Applicants respectfully renew their request to the Court on the form of order sought in the Application, including all electronic mail that may have otherwise been excluded.[59] Applicants further request that the Court declare that the public interest in compliance with the statutory time limits set out in Articles 7 and 8 of the Public Access Regulation is an overriding public interest in disclosure, compelling mandatory release of those documents for which no claims to exception are made during the two-stage administrative procedure and an overriding public interest would nevertheless compel disclosure.

Dated: _31___ August 2010 Respectfully submitted,

CLIENTEARTH

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Stephen Hockman QC

On behalf of the Applicants ClientEarth, Transport & Environment, European Environmental Bureau and BirdLife International

[59] Applicants Application, pp. 31-32.