

Practical guide to requesting access to environmental information from EU bodies.

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Access to environmental information

- Previous webinars covered the basics and how to interpret the exceptions to disclosure – available on our website page “Access to justice for a greener Europe” – event.

<https://www.clientearth.org/challenging-non-disclosure-of-environmental-information-register-to-our-webinar/> and <https://www.clientearth.org/webinar-3-access-to-environmental-information-how-to-tackle-contentious-exceptions/>

- Focus of today:
 - Practical tips on how to request access to environmental information from EU institutions and bodies



Steps by step approach to requesting environmental information

1. What to think about before making a request
2. Drafting the request when you don't know what info exists
3. Submitting the Request
4. Deciding whether to challenge the refusal
5. Drafting the confirmatory application
6. Deciding whether to challenge a confirmatory decision and, if so, where



1. Before the request – “environmental information”?

What is environmental information? Wide definition:

- Information in any form (written visual, aural, electronic, etc)
- On the state of the elements of the environment (e.g. air, water, soil, land, biological diversity)
- Factors affecting or likely to affect the elements of the environment (substances, energy, noise, emissions, etc)
- Measures affecting or likely to affect such elements and factors
- Reports on the implementation of env legislation
- Economic analyses used in the framework of measures;
- State of human health and safety, conditions of human life.



1. Before the request: is the info already publicly available?

The screenshot shows a web browser window with the URL `consilium.europa.eu/register/en/content/int?lang=EN&typ=ADV`. The page header includes the European Council logo and navigation links: "The European Council", "The Council of the EU", "Policies", "Meeting calendar", "Documents & Publications", "Press", and "Contact". A search bar and a language selection dropdown are also present. The main content area is titled "Search in the register" and features a "Public Documents only" checkbox. Below this, there are four search criteria with input fields: "Words in Subject", "Words in Text" (with a note "search only possible in public documents"), "Document Number" (with the example "5563/18, 14217/1/17"), and "Interinstitutional File" (with the example "2000/0183(COD), 2001/0011(CNS)"). A "Subject Matter" field is also present. At the bottom of the search section are "List" and "Clear" buttons. The Windows taskbar at the bottom shows the date as 07/01/2020. In the bottom right corner, there is a "Life" logo (a blue circle with yellow stars and the word "Life" in yellow) and the ClientEarth logo.

1. Before the request: is the info already publicly available?

- Council: <https://www.consilium.europa.eu/en/documents-publications>
- Commission: <https://ec.europa.eu/transparency/regdoc/>
- Parliament: <https://www.europarl.europa.eu/RegistreWeb/home/welcome.htm?language=EN>
- European Investment Bank: <https://www.eib.org/en/registers/index.htm>



2. Formulating a request

- Distil in your mind what you want to know and why
- Make as few requests as possible, e.g. don't request the same information from two or more institutions/bodies
- Make your request as precise as possible!
 - A document reference or precise date
 - BUT what if you don't know if the info exists?
- Remember you can't request the same information twice



2. Formulating a request

- An open request can be narrowed down by:
 - The form of information, e.g. correspondence, meeting minutes, draft decisions, notifications, MS applications for derogations, legal advice, etc.
 - The content: Member States'/institutions' positions, lobby positions sent by third parties, Commissioners' expenses, etc
 - Decision-making process, e.g. related to the adoption of Regulation...
 - Time span, e.g. between 30/6/2017 and 31/12/2019
 - Author/actor, e.g. correspondence/meetings with a specific person or rank of official



2. Formulating a request

- Example 1:

In accordance with Regulation 1049/2001 and Regulation 1367/2006, we hereby request access to the following documents that are listed on the Council's documents register:

- ST 14471 2019 INIT
- ST 14471 2019 ADD 1
- ST 14471 2019 ADD 2

Additionally, we request access to any other documents in the Council's possession which record the positions of Member States in relation to the Proposal for a Council Regulation fixing for 2020 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters.



2. Formulating a request

- Example 2: AND or OR??

ClientEarth requests, in accordance with Regulations 1049/2001 and 1367/2006, access to the Catalogue foreseen by Article 16(10)(a) of the Cosmetics Regulation or, if such catalogue does not yet exist, to the notifications foreseen by Article 13(1) for cosmetics including nanomaterials, as well as the information notified under Article 16(3).



2. Formulating a request

- Example 3: information on “whether”!

In accordance with Article 2 of Regulation 1049/2001 and Article 3 of Regulation 1367/2001, we would like to have access to all of the reports submitted by the Member States to the Commission in accordance with Article 118 of Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy.

In addition, we would like to have information on whether there are any ongoing Pilot cases or infringement procedures regarding the Member States’ obligations under Regulation 1224/2009.



3. Submitting a request: asktheeu.org

The screenshot shows the 'asktheeu.org' website. The browser address bar displays 'asktheeu.org/en/profile/sign_in?r=%2F'. The website header includes the logo 'asktheEU .org it's your right', a language menu with 'English', 'Deutsch', 'Español', and 'Français', and a 'Sign in or sign up' link. A search bar is also present. A green navigation bar contains links for 'How it works', 'Which EU body?', 'Make a request', 'Browse requests', and 'Blog'. The main content area is titled 'Please create an account or sign in' and is split into two columns. The left column is for 'Create a new account' and includes fields for 'Your name:', 'Your e-mail:', and 'Password:'. A note states: 'Your **name will appear publicly** ([why?](#)) on this website and in search engines. [Thinking of using a pseudonym?](#)'. Below the email field, it says 'We will not reveal your email address to anybody unless [you or the law tell us to](#).' The right column is for 'Sign in' and includes a 'Got an account?' link, a 'Sign in' heading, and fields for 'Your e-mail:' (containing 'afriel@clientearth.org') and 'Password:'. A 'Forgotten your password?' link is below the password field. At the bottom, there is a checkbox for 'Remember me (keeps you signed in longer; do not use on a public computer)'.

Sign in or make a new account - x +

asktheEU .org it's your right

English Deutsch Español Français

Sign in or sign up Search

How it works Which EU body? Make a request Browse requests Blog

Please create an account or sign in

Create a new account

Your name:

Your **name will appear publicly** ([why?](#)) on this website and in search engines. [Thinking of using a pseudonym?](#)

Your e-mail:

We will not reveal your email address to anybody unless [you or the law tell us to](#).

Password:

Got an account?

Sign in

Your e-mail:

Password:

[Forgotten your password?](#)

Remember me (keeps you signed in longer; do not use on a public computer)

3. Submitting a request: asktheeu.org

- Pros:
 - Provides prompts as to which institution/body/department to submit to;
 - Don't have to spend time looking for email address/online form;
 - Sends notifications when a response is received;
 - Calculates deadlines for you;
 - Interested parties can follow your requests and have access to the information when it is provided;
 - Easy to keep track of multiple requests.



3. Submitting a request: asktheeu.org

- Cons:
 - A permanent public record of your request;
 - There can be a delay re the transmission of the request
 - Calculation of deadlines can be complicated, particularly for the purposes of challenging refusals in court.



3. Submitting a request: direct to institution concerned

- It can be difficult to find the gateway on institutions' website
- Institutions/bodies generally provide electronic forms or postal address
- Difficult to find an email address!
- Important to keep copies of requests and responses and dates!!!



Request a document form

Personal information

Required fields are marked with an asterisk (*)

Mr Ms

Family name:*

First name:*

E-Mail:*

Occupation:

On behalf of:

Keeping up to speed with deadlines

- Keep a copy of all requests and replies and the dates on which they were submitted received!
- Put deadlines in your calendar!
 - Initial response: 15 working days after request was REGISTERED (can be extended by further 15 working days)
 - Confirmatory application: 15 working days after initial response was received (cannot be extended in any circumstances) OR 15 working days after the initial response was due to be received if there has been no answer
 - Confirmatory decision: 15 working days after confirmatory application was REGISTERED (can be extended by additional 15 working days)
 - Court challenge: 2 months and 10 days from date of confirmatory decision
 - Ombudsman: 2 years from date of confirmatory decision



Keeping up to speed with deadlines

- Institutions can acknowledgment of receipt of a request days or weeks after it was submitted; can sometimes Covers pre-litigation phase, including pilot procedure until a definitive position that no infringement procedure will be launched or judgement rendered
- Applies as long as infringement procedure „reasonable foreseeable, not purely hypothetical“
- Extends to conformity checking studies where letter of formal notice sent = documents related to an „ongoing administrative or court procedure“

= very difficult to receive info held by EC on MS violations of EU law



4. Confirmatory application?

- You must submit a confirmatory application if you want to challenge a refusal before the Court of Justice of the EU or the EU Ombudsman!
- Deciding whether to submit a confirmatory application:
 - Did you receive a reply before the deadline?
 - Was information withheld?
 - Is the withheld information significant for your purpose (e.g. personal data)?
 - Do you agree with the decision to withhold information?
 - Do you have reason to doubt that the institution has identified all of the documents that come within the scope of your request?



5. Drafting the confirmatory application

“In conformity with Article 7(2) of Regulation (EC) No 1049/2001, ClientEarth hereby submits a confirmatory application regarding the Commission's decision of 13 December 2019 to partially refuse ClientEarth's access to documents request of 22 November 2019 (hereafter "the Decision"). ClientEarth's original request pertained to the following information... We request a reconsideration of the decision for the following reasons...”



5. Drafting the confirmatory application

- Failure to state reasons: If you have not received a reply to your request

“According to Article 7(4) of Regulation 1049/2001 failure to respond to a request amounts to an implied refusal. As clarified by the CJEU, “[s]uch an implied refusal implies, by definition, an absolute lack of reasoning” and therefore also a failure to comply with Article 296 TFEU (Case T-300/10 *Internationaler Hilfsfonds v Commission*, para. 186).”



5. Drafting the confirmatory application

- Failure to state reasons: If you have received a reply:
“In the context of a request for access to documents, the duty to state reasons in Article 296 TFEU entails that if an institution decides to refuse access to a document, it must provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine (see C-266/05 P Sison v Council).”



5. Drafting the confirmatory application

- Failure to state reasons: If an exception has been applied to withhold information:

“The institution “must, in principle, explain how access to [a] document could specifically and actually undermine the interest protected by that exception. Moreover, the risk of the interest being so undermined must be reasonably foreseeable and must not be purely hypothetical. The [institution’s] reply fails to meet this standard.”

C-57/16 P ClientEarth, para. 51



5. Drafting the confirmatory application

- Checking the institution has identified all relevant info:

“We therefore request that the Commission verify whether it is in possession of documents falling within the scope of our request on this point, in line with the CJEU's case law in case T-653/16 Malta v Commission, para. 63. It should be recalled that failure to disclose existing documents constitutes an implied refusal of access, for the purposes of Article 7(1) of Regulation No 1049/2001, read in conjunction with Regulation 1367/2006, and a failure to state reasons in breach of Article 296 TFEU (Case T-300/10 Internationaler Hilfsfond eV, para. 186).”



5. Drafting the confirmatory application: misapplication of an exception

“The [institution] has misapplied the exception in Article 4 of Regulation 1049/2001 for the following reasons:...”

- See ClientEarth webinar of 5 December 2019 for substantive arguments, available at: <https://www.clientearth.org/webinar-3-access-to-environmental-information-how-to-tackle-contentious-exceptions/>



5. Drafting the confirmatory application

- Failure to consider the existence of an overriding public interest in disclosure:

“Even if the exception in Article 4... of Regulation 1049/2001 is applicable, the [institution] failed to consider the overriding public interest in disclosure.”

OR

“Even if the exception in Article 4... of Regulation 1049/2001 is applicable, the [institution] was wrong to consider that there is no overriding public interest in disclosing the withheld information...”



6. Challenging a confirmatory decision

Procedure recap:

1. Mandatory: Confirmatory application to authority that refused the request
2. If refused -> options:
 - a) Complaint to the EU Ombudsman OR
 - b) Judicial challenge to the EU General Court



Should you bring a challenge?

What to consider:

- Will the information still be relevant after added delay?
- Strength of your argument (likelihood of success)
- Broader impact of the case (jurisprudence, behavioural change...)
- Capacity investment + costs



Strength of your argument

Some examples of info that should in principle be accessible:

- Lobbying communications
- Meeting minutes
- Legislative impact assessments before proposal is published
- CJEU case files once case is closed
- Basic information on ongoing EU pilots and infringement procedures (MS, relevant dates, nature of infringement)
- Infringement files once case is closed
- Evidence underlying decisions
- (drafts of) plans/programmes/etc submitted by Member States to fulfil an obligation



Broader impact

Some currently contentious areas:

- New general presumptions of non-disclosure
 - For current list, see Case C-57/16 *ClientEarth*, para. 81
- Definition of emissions into the environment
- Almost any use of internal decision-making exception (Art. 4(3))
- Access to Member State positions (in Council etc)
- Comitology transparency
- EIB information on financing operations
- Lack of active dissemination (hard to challenge)



Option 1: CJEU

- Deadline to file: 2 months + 10 days (distance) from confirmatory decision / implied refusal
- Need to be represented by “independent” lawyer – Art. 19
 - “sufficiently distant” = not employee, chairman, board member, trustee.. - C-573/11 P *ClientEarth v Council*, C-259/14 P ADR etc
- Application → Defence → Reply → Rejoinder → Request for hearing → hearing → judgement (1.5-2 years)
 - Possibility to appeal to Court of Justice
- If successful: Strikes down decision → institutions issues new decision



Option 1: CJEU

- Interventions:
 - must show interest to intervene
 - For criteria, see for example: T-57/11, Order of 6 November 2012, *Castelnou Energía*, ECLI:EU:T:2012:580, paras 16-21
 - some MS intervene in favour (esp. SWE)
 - affected MS may intervene against + EC
- Applicant/defendant has right to reply to interventions



Option 2: European Ombudsman

- Deadline: 2 years after the confirmatory decision / implicit refusal
- Can combine number of requests in one complaint on same topic
- Timeline not as fixed:
 - can request reply and/or have inspection meeting
 - Can be resolved informally or recommendations -> opinion of institution (3 months) -> closing decision
- Important to follow up actively with desk officer!



How to decide: EU General Court

- Advantages:
 - Binding decisions;
 - Possibility to appeal;
 - Develops case law, binding interpretations of the law
- Disadvantages:
 - Slow (1.5-2 years + pot. same on appeal);
 - Cost exposure (loser pays but costs of institutions usually low);
 - Strict procedural rules and scope of review



How to decide: EU Ombudsman

- Advantages:
 - Free of charge, 2 years to file
 - Considers wider maladministration issues as part of the complaint
 - No need for a lawyer
 - Political priorities, such as Council transparency(?)
- Disadvantages:
 - Unclear timeline
 - Non-binding decisions – may be ignored
 - More hesitant to interpret law



Examples: How we decide

- Cases we brought to the Court:
 - Commission impact assessments (C-57/16 P);
 - Conformity checking studies (C-612/13 P);
 - Identity of EFSA experts (C-615/13 P).
- Cases we brought to the Ombudsman:
 - Active dissemination of Fisheries Council documents (640/2019/FP)
 - Existing PILOT proceedings + MS reports on FCP (452/2018/AMF)
 - EIB Transparency Policy - not info request but general (1316/2016/TN)



Special case: Delay tactic

Institution may led judicial challenge start + then disclose as soon as decision-making procedure closed

- Time limit runs from deadline of reply for institution – careful not to miss!
- As soon as info is disclosed, usually no longer cause of action
 - Can sometimes argue that “continuing interest”– Ex: likely to recur bc new general presumption alleged - see C-57/16 P *ClientEarth*, paras 44-57
- Court will usually issue an order + award your costs

=> usually good to launch court challenge



Conclusion

- Access requests remain potent but underused tool
 - EU institutions will frequently refuse access in first decision in violation of legal requirements
 - Confirmatory application are most of the time worth to do
 - Court challenges + Ombudsman decisions can have a lasting impact beyond the case
- = Use your rights or lose them!



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Next : a series of 3 webinars on

« *Right to Clean Air and Access to Justice* »

Session 1 : “Right to Clean Air and Access to Justice: Who can go to Court?”

29 January, 12:30pm GMT+1

Register here: <https://meeting.zoho.eu/meeting/register?sessionId=1221181964>

Session 2: “Right to Clean Air and Access to Justice: procedural and substantial review by the judge.”

12 February, 12:30pm GMT+1

Register here: <https://meeting.zoho.eu/meeting/register?sessionId=1258245920>

Session 3: “Right to Clean Air and Access to Justice: How can the judgments by enforced?”

26 February, 12:30pm GMT+1

Register here: <https://meeting.zoho.eu/meeting/register?sessionId=1293302906>



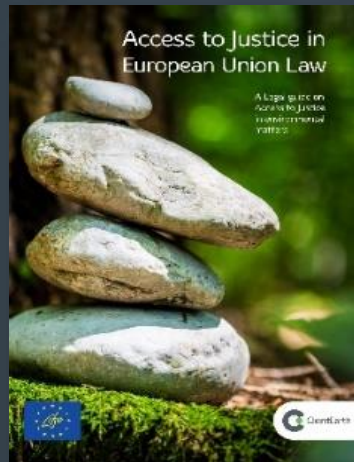
Thank you!

To know more about our LIFE project on Access to Justice EARL A2J and our next trainings, visit our website:

<https://www.clientearth.org/access-justice-greener-europe/>

And sign up for updates on Access to Justice :

https://www.action.clientearth.org/access-justice-newsletter?_ga=2.201027438.1583032739.1578912944-2129994527.1571747365&_gac=1.195725022.1576580999.CjwKCAiAluLvBRASEIwAAbX3GVAcq2bcPVj6Z129pwjoaBzxsN66dargggcDHZlQFcSulE2Ph-Rq8RoC2usQAvD_BwE



Have a look at our legal publications :

* Guide on access to justice in environmental matters at EU level:

<https://www.documents.clientearth.org/library/download-info/16209/>

* Country-specific legal toolkits on access to justice at national level:

<https://www.clientearth.org/country-toolkits-on-access-to-justice/>

