



Emily O'Reilly

European Ombudsman

Recommendation

on how the European Commission handled two requests for public access to the impact assessments and opinions of the Regulatory Scrutiny Board regarding the envisaged revision of REACH and the Mercury Regulation (case 1053/2023/MIK)

Made in accordance with Article 4(1) of the Statute of the European Ombudsman¹

The complainant, a civil society organisation, asked the European Commission to grant public access to the impact assessments and opinions of the Regulatory Scrutiny Board regarding the envisaged revisions of the Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals ('REACH') and the 'Mercury' Regulation. At the initial stage, the Commission disclosed heavily redacted versions of the requested documents regarding the revision of the REACH Regulation, and refused to disclose any documents regarding the revision of the Mercury Regulation. In doing so, the Commission invoked exceptions under the EU legislation on public access to documents, arguing that disclosure would undermine the protection of commercial interests and an ongoing decision-making process. Dissatisfied with this outcome, the complainant asked the Commission to review its decisions. When the Commission failed to reply within the statutory time limits, the complainant turned to the Ombudsman.

Following the Ombudsman's request, the Commission issued final decisions concerning both requests. It maintained its decision to disclose only the heavily redacted documents concerning the REACH Regulation. However, the Commission granted full public access to the documents concerning the Mercury Regulation, as it had concluded the relevant decision-making process in the meantime.

The Ombudsman has already taken the view that failure to comply with the time limits laid down in the EU legislation on public access to documents cannot be good administrative practice. It is crucial that citizens have timely public access to legislative documents, so that they can exercise their democratic right to influence EU law making.

Moreover, the Ombudsman is not convinced by the Commission's arguments that disclosure of the requested documents that concern the revision of the REACH Regulation would seriously undermine the interests protected by the exceptions set out in the EU legislation on public access to documents.

Therefore, the Ombudsman took the view that the Commission's refusal to grant full public access to the requested documents constituted maladministration. She recommended that the Commission review its decision and grant full public access to the requested documents.

¹ Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A253%3ATOC



Background to the complaint

1. The Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)² entered into force on 1 June 2007. It aims to improve the protection of human health and the environment from the potential risks of chemicals, while enhancing the competitiveness of the EU chemicals industry. It also promotes alternative methods for the assessment of the hazard of substances to reduce animal testing. As part of its Chemicals Strategy for Sustainability adopted on 14 October 2020, the European Commission announced a planned amendment of the REACH Regulation to achieve its ambition for safe and sustainable chemicals and a high level of protection of health and the environment, while preserving the internal market.³

2. The Mercury Regulation⁴ covers the full life cycle of mercury. On 14 July 2023, the Commission proposed its revision to target the last intentional remaining uses of mercury in a variety of products in the EU, in line with commitments set out in the EU's Zero Pollution Ambition.⁵

Request for public access to the REACH-related documents

3. On 25 November 2022, the complainant, a civil society organisation, requested public access⁶ to the impact assessments and opinions of the Regulatory Scrutiny Board (RSB) regarding any envisaged revisions of the REACH Regulation.

4. On 13 January 2023, the Commission granted public access to a heavily redacted version of these documents.

5. On 19 January 2023, the complainant made a confirmatory application requesting wider access. The extended deadline for the Commission to reply elapsed on 2 March 2023.

6. On 12 June 2023, not having received a reply, the complainant turned to the Ombudsman.

Request for public access to the Mercury Regulation-related documents

7. On 17 January 2023, the complainant requested public access to the impact assessments and RSB opinions, as well as a list and minutes of any 'upstream meetings' held between RSB and the staff of the Commission regarding the revision of the Mercury Regulation.

² Regulation 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ L 396/1.

³ https://environment.ec.europa.eu/news/chemicals-commission-seeks-views-revision-reach-eus-chemicals-legislation-2022-01-20_en

⁴ Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury, OJ L 137/1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1531231211865&uri=CELEX:32017R0852>

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https://environment.ec.europa.eu/topics/chemicals/mercury_en#:~:text=In%20July%202023%20the%20Commission%20adopted%20the%20Delegated%20Regulation%20transposing,lamps%20and%20non%20electrical%20equipment

⁶ Under Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN>



8. On 24 February 2023, the Commission refused to disclose the requested documents.
9. On 1 March 2023, the complainant made a confirmatory application.
10. In the absence of a reply, the complainant turned to the Ombudsman on 12 June 2023.

The inquiry

11. The Ombudsman opened an inquiry to seek a prompt reply to the complainant's confirmatory applications. The Ombudsman inquiry team also inspected the documents at issue in order to examine the extent of the public access granted and the specific reasons provided by the Commission justifying its non-disclosure of the requested documents or their parts.

12. The Ombudsman invited the Commission to provide any additional views for her to take into account during this inquiry. The Commission chose not to provide any additional views.

13. In the course of the inquiry, the Commission replied to the complainant's confirmatory applications. Specifically, on 5 July 2023, the Commission issued a confirmatory decision on the request for public access to the REACH-related documents, maintaining its initial position. On 14 July 2023, the Commission published a revised impact assessment and the related second RSB opinion on the proposed revision of the Mercury Regulation. On 10 August 2023, the Commission granted public access to the requested documents, that is, full access to an earlier version of the impact assessment and the opinion of the RSB, with the exception of personal data.

14. The Ombudsman received the comments of the complainant on the Commission's replies.

The scope of this recommendation

15. Since the complainant has in the meantime received access to the documents related to the revision of the Mercury Regulation, this recommendation concerns only those documents which concern the revision of the REACH Regulation. That said, the Ombudsman will include her assessment of how the Commission handled the request for the documents related to the Mercury Regulation in her decision closing this inquiry.

Arguments presented to the Ombudsman

By the complainant

16. The complainant considered that its confirmatory applications were not handled in a timely manner. It was concerned that the delays by the Commission in handling the requests were an attempt to avoid responding to them until the relevant legislative proposals were published. At that point in time, however, the complainant claimed that it



would be too late for it to exercise the democratic right to influence the decision-making process.

17. The complainant contended that, in accordance with EU case-law,⁷ documents drawn up in the context of an impact assessment of a possible legislative proposal are legislative documents, which should be made directly accessible to the public.⁸

18. The complainant argued that the requested documents contained 'environmental information' within the meaning of Regulation 1367/2006,⁹ which imposes a higher standard of transparency on such information.

19. The complainant also argued that exceptions to the right of public access to legislative documents must be interpreted in a particularly restrictive way. In the complainant's view, the Commission provided no specific evidence of the actual and specific risk to its decision-making process by the full disclosure of the requested documents.

20. The complainant also considered that, in any case, an overriding public interest in the disclosure of the requested documents exists, especially in view of the on-going exposure of humans to harmful chemical substances and their impact on the natural environment. According to the complainant, there is a real urgency in addressing any shortfalls or deficiencies in the existing EU laws and that only public access to the requested documents would enable the complainant to influence the legislative processes in question.

By the Commission

21. In its confirmatory decision concerning the REACH-related documents, the Commission argued that full disclosure of the impact assessment and related RSB opinion would **seriously undermine the Commission's ongoing decision-making process**.

22. It stated that the redacted passages contain information about policy options, their possible impacts, a comparison of the options, details on a preferred option and the methodology for evaluating impacts. It explained that the redactions in the annexes concern the potential options, the practical implications of proposed options and the methodology for screening and assessing impacts. Furthermore, the Commission explains that the redactions in the opinion of the RSB and the summary of the findings (which mirror the information in the impact assessment) concern the conclusion as well as detailed comments on the impact assessment.

23. The Commission argued that the impact assessment was still a draft and work-in-progress, which was being revised in light of the RSB opinion. Fundamental elements of the impact assessment were being reconsidered. If released at that stage, the content of the

⁷ Judgment of 4 September 2018, Case C-57/16 P, *Client Earth v Commission*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=205322&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1918932>, paragraphs 84-93

⁸ Article 12(2) of Regulation 1049/2001

⁹ Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264/13, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367>



redacted parts could give rise to external pressure, putting at risk the timely adoption of the impact assessment. The revision of REACH would significantly impact a wide range of stakeholders. The intense lobbying had already been documented in the press.¹⁰ Therefore, according to the Commission, the risk was “*very serious and real*”. Also, the Commission was concerned that some redacted parts could be taken out of context, adversely affecting the conduct of the ongoing decision-making process.

24. The Commission considered that its work on the impact assessment was transparent and involved all stakeholders. The majority of studies for the purpose of developing the impact assessment had already been made public.

25. The Commission further argued that full disclosure of the requested documents would **undermine the protection of commercial interests of the Commission’s contractors** who performed studies underpinning the impact assessment, including their intellectual property.

26. The Commission stated that, according to the contractual arrangements in force, “*the Union acquires all the rights as from the moment the contractor has created the results*”. In the Commission’s view, under these arrangements, the intellectual property of the studies would be transferred only once the final results were approved by the Commission. This was not yet the case with regard to all the studies at the time the request was made. Therefore, some sections of the impact assessment were redacted to protect the intellectual property of third parties. In the Commission’s view, only their authors could authorise their disclosure or dissemination at that time.

27. The Commission further considered that the documents at issue do not contain ‘environmental information’ or ‘information related to emissions into the environment’.¹¹ Therefore, in the Commission’s view, a higher standard of transparency did not apply. In particular, the Commission argued that estimates and projections of the effectiveness of the chemical policy were still being revised and refined and could not be considered as ‘environmental information’. Nor did they reflect information about actual or foreseeable emissions within the meaning of the EU case law.

28. The Commission considered that there was **no overriding public interest in disclosure**.

The Ombudsman's assessment leading to a recommendation

On the nature of the documents at stake in this inquiry

¹⁰ The Commission referred to the following article published online: <https://corporateeurope.org/en/2020/09/will-eu-commission-stand-firm-against-toxic-lobbying-pressure>

¹¹ Article 2(d)(iii) and Article 6 of Regulation 1367/2006. In case the document is deemed to contain environmental information, exceptions under Regulation 1049/2001 must be interpreted restrictively. In case the document is deemed to contain information on the emissions to the environment, the overriding interest in disclosure would be deemed to exist in law.



29. Under the EU Treaties, citizens have the “*right to participate in the democratic life of the Union*”.¹² Therefore, all EU decisions must be taken “*as openly and as closely as possible to the citizens*”.¹³ This is particularly important when EU institutions act in their “*legislative capacity*”.¹⁴ The principle of legislative transparency is enshrined in the EU Treaties¹⁵ and is reflected in the EU law on public access to documents, which states that “*legislative documents*” must be directly accessible to the public, unless their disclosure would undermine one or several public or private interests explicitly protected.¹⁶ The possibility for citizens to scrutinise all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights.¹⁷

30. The documents at issue in this inquiry are clearly legislative documents, to which the highest standards of transparency must apply. The Court of Justice held that impact assessments are key tools for ensuring that EU legislative proposals are developed based on transparent, comprehensive and balanced information. Therefore, impact assessment reports and the accompanying RSB opinions constitute important elements of the EU legislative process.¹⁸

31. In addition, the Ombudsman considers that, while the relevant parts of the requested documents may not relate to ‘information on emissions into the environment’, these parts do contain ‘environmental information’. ‘Environmental information’ may be any information used in policies or legislation relating to the environment. The impact assessment at issue here contains the study of the impact of different policy options envisaged in respect of environmental matters. In accordance with EU case-law¹⁹, this must be deemed to be environmental information.

32. Under the EU Aarhus Regulation, if a document contains ‘environmental information’, the exceptions provided for in the EU legislation on public access must be interpreted restrictively.²⁰

33. Since the requested documents constitute ‘legislative documents’ and contain ‘environmental information’, the exceptions set out in Regulation 1049/2001 must be interpreted particularly restrictively.

On the application of the exception relating to the protection of an ongoing decision-making process

¹² Article 10 of the Treaty on European Union (TEU)

¹³ Articles 1 and 10(3) TEU

¹⁴ Recital 6 of Regulation 1049/2001

¹⁵ Article 15(2) TFEU

¹⁶ Article 12(2) and Recital 6 of Regulation 1049/2001

¹⁷ See, to that effect, judgments of the Court of Justice of 1 July 2008, Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, para. 46, <https://curia.europa.eu/juris/liste.jsf?num=C-39/05&language=en> and of 17 October 2013, Case C-280/11 P, *Council v Access Info Europe*, para. 33, <https://curia.europa.eu/juris/liste.jsf?num=C-280/11&language=EN>

¹⁸ Case C-57/16 P, *Client Earth v Commission*, paragraphs 90-91

¹⁹ See a similar assessment in Case C-57/16 P, *Client Earth v Commission*, paragraphs 97 and 101

²⁰ Article 6(1) of Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264/13, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367>



34. Having inspected the non-redacted versions of the REACH-related documents, the Ombudsman found that the redacted parts are not particularly sensitive. Rather, they constitute an example of the type of work that would underpin any legislative proposal, especially in so far as they contain different policy options, analyses of these options and their potential consequences.

35. The Commission argued that the redacted parts of the requested documents were still work-in-progress. As such, it claimed that these parts could be misinterpreted if disclosed and could lead to external pressure, putting at risk the timely adoption of the impact assessment.

36. As the EU Courts have held on multiple occasions, the public is perfectly capable of understanding that certain documents are provisional in nature and may thus be subject to change.²¹ Crucially, the Court of Justice recalled that the expression by the public or interested parties of their views on the policy options envisaged by the Commission *before* specific legislative proposals are announced “*is an integral part of the exercise by EU citizens of their democratic rights*”.²²

37. According to EU case-law, the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process. However, the reality of such external pressure must be established with certainty and ‘tangible evidence’ must be adduced to show that there is a reasonably foreseeable risk that the decision would be substantially affected owing to that external pressure.²³ The Commission must demonstrate that this pressure and influence would seriously affect, prolong or complicate the proper conduct of the Commission’s decision-making.

38. The Ombudsman understands that the EU administration may be reluctant to share its preliminary views that may be subject to public criticism and pressure. However as the Court of Justice held it is for the Commission to prevent any adverse impact in its decision-making process arising from such external pressures. Refusing public access to legislative documents cannot be used as a safeguard by EU institutions when faced with external pressures.²⁴

39. The Commission refers to an online article from 2020, which reported external pressure on the Commission while it was developing its new chemical policy.²⁵ However, this article suggests that, in 2020, the chemical industry might have had privileged access to the Commission’s decision-making process. If this was the case, disclosure of the requested documents would be all the more important as it could put industry and civil society on an equal footing. In any case, the article does not elaborate on why the risk of external pressure in this case would be more serious than in cases of other legislative initiatives of the Commission and why this risk would substantially affect the

²¹ Judgment of the General Court of 22 March 2018, Case T-540/15, *De Capitani v Parliament*, paragraph 120. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=200551&pageIndex=0&doclang=en&mode=lst&dir=&cc=first&part=1&cid=774069>

²² Case C-57/16 P, *Client Earth v Commission*, paragraph 108

²³ Case T-252/19, *Pech v Council*, paragraph 92,

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=240171&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1916898>

²⁴ Case C-57/16 P, *Client Earth v Commission*, paragraph 124

²⁵ <https://corporateeurope.org/en/2020/09/will-eu-commission-stand-firm-against-toxic-lobbying-pressure>



Commission's ability to complete its work. Neither did the Commission explain why it considers that external pressure would be *further increased* due to disclosure of these documents.

40. The Ombudsman notes that a large number of the Commission's legislative initiatives attract significant public interest from various stakeholders and the media. If the Commission could justify non-disclosure of its impact assessments by reference to such interest and potential public pressure, it would mean that the principle of transparency of EU law-making would be devoid of any practical meaning. There is nothing in the Commission's argumentation to suggest that the decision-making in question is *exceptional* so as to justify an *exception* to the fundamental right of public access to legislative documents.

41. The Commission also argued that the work on its impact assessment was transparent and inclusive, and that some other documents concerning this impact assessment had already been published. However, the fact that other sources of potentially relevant information are available is not pertinent to the assessment of an application for public access to documents.²⁶

On the application of the exception relating to the protection of commercial interests

42. The Commission further argued that full disclosure of the requested documents was prevented by the need to protect the commercial interests and intellectual property of the contractors who carried out the studies underpinning the impact assessment.

43. In its confirmatory decision, the Commission stated that, according to the arrangement with its contractors, "*the Union acquires all the rights as from the moment the contractor has created the results...*". However, the Commission then argues that the intellectual property of some studies, the results of which have been included in the impact assessment, had not yet been transferred to the Commission at the time of the request as the Commission has not yet approved these results. The Ombudsman does not find this argument entirely clear. Based on the contractual arrangement cited by the Commission, it would seem that if certain results have already been included in the draft impact assessment, they must have already been "created" and, therefore, acquired by the Union based on the contractual provision cited above.

44. However, regardless of whether the Commission has already acquired the intellectual property rights, in order to rely on this exception, the Commission must show that the documents requested contain elements which may, if disclosed, seriously undermine the commercial interests of a person.²⁷ According to the case law, the protection afforded to intellectual property rights does *not* systematically take precedence over the presumption of disclosure by means of the right of public access to documents under Regulation No

²⁶ Case T-540/15, *De Capitani v Parliament*, paragraph 108

²⁷ Judgement of the General Court of 5 February 2018, Case T-718/15, *PTC Therapeutics International v EMA*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=199044&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1918748>, paragraphs 64 and 85



1049/2001.²⁸ The Ombudsman considers that the Commission failed to demonstrate how the commercial interests of its contractors would be undermined.

45. Overall, the Ombudsman concludes that none of the arguments presented by the Commission justify the refusal to provide full public access to the requested documents in line with Regulation 1049/2001 and the case law of the EU Courts. In this context, it should be recalled that the requested documents constitute legislative documents and contain environmental information, so a particular high standard of transparency applies to them.

46. In light of the above, the Ombudsman finds that the Commission's refusal to grant full access to the requested impact assessment and RSB opinion related to the revision of the REACH Regulation constituted maladministration. She therefore makes a corresponding recommendation below.

47. As regards the time taken by the Commission to process the complainant's access requests, the Ombudsman notes that this case is another example of the significant and systemic delays the Commission encounters in dealing with confirmatory applications, which the Ombudsman considered to amount to maladministration in the context of an own-initiative inquiry into the matter earlier this year.²⁹ Most recently, the Ombudsman brought the matter to the attention of the European Parliament by way of a Special Report.³⁰ This case exemplifies how crucial it is for citizens to have timely public access to legislative documents, so that they can exercise their democratic right to influence EU law making.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the Commission:

The European Commission should fully disclose the requested documents concerning the revision of the REACH Regulation without any further delay.

The Commission and the complainant will be informed of this recommendation. In accordance with Article 4(2) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 22 December 2023.

²⁸ See also judgement of the General Court of 13 January 2017, Case T-189/14, *Deza v ECHA*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=186721&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1918841>, paragraph 119

²⁹ Recommendation on the time the European Commission takes to deal with requests for public access to documents (strategic inquiry OI/2/2022/OAM), available at: <https://www.ombudsman.europa.eu/en/recommendation/en/167661>

³⁰ Special Report of the European Ombudsman in her strategic inquiry concerning the time the European Commission takes to deal with requests for public access to documents (OI/2/2022/OAM), <https://www.ombudsman.europa.eu/en/special-report/en/175425>



A handwritten signature in black ink, which appears to read 'Emily O'Reilly'. The signature is fluid and cursive, with a long horizontal stroke at the bottom.

Emily O'Reilly
European Ombudsman

Strasbourg, 25/09/2023