

**Complaint to European Ombudsman's Office on Dieselgate Documents**  
Submitted on 12 July 2018 by Bas Eickhout on behalf of the Greens/EFA Group

I would like to initiate a complaint with regards to a partial refusal by the European Commission to provide public access to documents following the Dieselgate scandal. I believe that they have applied the exceptions in Regulation 1049/2001 on access to documents too widely and am also concerned at their narrow interpretation of what constitutes environmental information together with their broad interpretation of commercial interests.

The initial request, submitted on 27 January 2017, sought access to the minutes and summary records of the meetings of the Technical Committee on Motor Vehicles (TCMV) from September 2016 to January 2017. The summary records are already public, but part of the minutes have been withheld.

It is in the Technical Committee on Motor Vehicles that detailed implementing measures are discussed and voted upon, and this request was made in the context of the follow-up to the Dieselgate scandal and the European Parliament's inquiry committee set up after the revelations to establish the facts.

To date, the minutes of the TCMV have only been made available to Members of the European Parliament from the EMIS inquiry committee, who were given restricted access. Despite not holding the status of classified information, MEPs were obliged to access the minutes in a dedicated 'secure reading room'.

I am pursuing this complaint because I feel that there is a clear public interest in ensuring the transparency and accountability of key decision-making processes, particularly in areas that directly affect public health and the environment.

In addition, the TCMV is responsible for detailing how EU legislation should be applied in practice, but even if these discussions are usually technical in nature, they also have a wider political significance, particularly in this case. This complaint is therefore relevant both to Members of the European Parliament and to national Parliaments, as well as the wider public.

I will briefly address each argument separately, following the structure of the Commission's reply, dated 9<sup>th</sup> May 2017, to our confirmatory application lodged on 4<sup>th</sup> April 2017.

### **Access to personal information**

The Commission has refused access to the names, surnames and contact details of Commission staff members and of representatives of national administrations. The reason for this, according to the Commission, is that I have not "*established the necessity of disclosing any of the above-mentioned personal data.*"

However, I consider that it is necessary for citizens, experts, MEPs and civil society organisations to know who is participating in TCMV meetings because these technical experts are fundamental in shaping the way EU legislation is actually implemented in practice. The "Dieselgate" scandal revealed that there can be serious flaws in the way EU emissions legislation is applied, with technical loopholes being introduced via the comitology procedure that in effect allow for larger emissions than those established by the legislation.

It is therefore necessary for the public to know whether the participants in the TCMV are technical or political representatives in order to understand the nature of the decision-making process. MEPs, journalists and the wider public need to be able to know who is attending these meetings on behalf of their national governments in order to exercise the required degree of oversight and accountability. This need for accountability was upheld by the European Court of Justice in the ClientEarth v EFSA case (C-615/13P).

Indeed, it is only via transparency and accountability that we can be sure that it is not possible to modify the will of the legislators, at least not in an unaccountable manner. Furthermore, refusing access to the names, particularly of government representatives, is in fact contributing to the disconnect that citizens feel with Brussels and it also allows some governments to foster a “blame Brussels” culture, which is deeply detrimental to EU democracy.

Finally, it is worth highlighting that the case law of the European Court of Human Rights is quite clear that information about people acting in a professional manner or in one that is relevant to the public interest should fall under higher levels of scrutiny than information about private individuals acting in a personal capacity.

For the future, in order effectively to guarantee transparency and maintain public trust in the EU administration, we would recommend that there should be a standard requirement on those participating in Technical Committees or analogous fora that they should consent to making their personal data publicly available, since they are acting on behalf of their governments and on behalf of their citizens. This disclosure should be considered a condition of appointment.

### **Commercial interests**

The Commission argues in its refusal that public access to some of the information contained in the documents could cause harm to the commercial interests of certain companies. Before turning to this specific argument, it should be highlighted that the information contained in the requested documents is about legislation on emissions into the environment. The Aarhus Convention and Regulation are very clear that the public interest in environmental information should override a company’s commercial interests.

This point aside, the European Commission has at no point substantiated specifically how and why the protection of the commercial interests of any given company would be undermined if these documents were to be made publicly available. In its reasoning, the Commission alludes to 2 different types of “harm”, which it mixes together.

The first revolves around the functioning of a steering system developed by a car manufacturer. According to the Commission this “has to be considered as part of specific know-how pertaining to the latter [car manufacturer] and as such constitutes commercially sensitive business information.” However, it is doubtful that the level of detail contained in these documents would be so high as to permit competitors to steal the information. In addition, even if they were to do so, the company involved would still have recourse to all the usual mechanisms for protecting its commercial interests such as patent laws.

The second is based purely on the company’s reputation. The Commission argues that “*Public disclosure of this information, would have clearly negative effect on manufacturer’s public image and reputation, thus affecting its commercial interests.*” But “affecting” a company’s commercial interests is not the same as “*undermining the protection of commercial interests of a natural or legal person*”, which would require a higher threshold. In addition, even if the exception on the protection of commercial interests could be deemed applicable, the image and reputation of a company must be distinguished from its economic interests.

The Commission therefore erred in its balancing of the different interests. The ‘right’ to a company’s reputation is not in the same order as the public’s fundamental right to freedom of expression and information. The commercial interests of a company can also not outweigh the right of access to environmental information. In addition, the overriding public interest in this information is all the more acute given that concerns were raised by certain members of the Committee when discussing the steering system mentioned above. It is also a matter of public interest to be informed if the Commission is investigating a particular car manufacturer.

It is also unclear why there seems to be no room for increased partial access to the information, for example by blanking out the names of the companies concerned. Neither is it evident from the

Commission's response to our confirmatory application whether or not they actually consulted with the company or companies concerned to determine the level of protection that might be considered appropriate. The risk is that the Commission's decision to err on the side of refusal could have been based on their own assumptions rather than on any reasoned analysis or on any specific weighting of the different interests concerned.

### **Protection of the Decision-making Process**

The European Commission has argued that *“The Member States and the Commission must be free to explore all possible options in preparation of a decision within a committee free from external pressure. Consequently, public disclosure of the positions of the individual Member States would prevent Member States from frankly expressing their views in the framework of committee meetings and thus seriously undermining the possibility of the Commission to explore all possible options in preparation of a decision and impairing the quality of the decision-making process. Therefore, public access to the views of individual Member States would seriously undermine the Commission's decision-making process. That risk is reasonably foreseeable and not purely hypothetical.”*

The European Court of Justice has already thrown out this simplistic argumentation by clearly stating, in the judgment in the case *Access Info v. Council*, that *“It should be noted that public access to the entire content of Council documents – including, in the present case, the identity of those who made the various proposals – constitutes the principle, above all in the context of a procedure in which the institutions act in a legislative capacity, and the exceptions must be interpreted and applied strictly... If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information.”*

Indeed, our reading of democracy is precisely this – that NGOs and businesses should be given the opportunity to make their views known to their EU and national representatives. A decision-making process that relies on opacity and on obscuring the positions of each Member State runs counter to the very principles of an open administration and of a vibrant, functioning and accountable democracy such as the EU.

Representatives of the EU Member States in the TCMV are responsible for defending the public interest of their Member States and the health of their citizens and the environment. It is therefore difficult to accept the claim that transparency would seriously undermine their work and the decision-making process. On the contrary, transparency would allow for the necessary checks and balances and would reduce the democratic deficit and the possibility for individual Member States to blame Brussels for decisions taken that they were a full part of. It is also unclear why transparency of the voting behaviour of the Member States would have the potential to *“seriously undermine the decision-making process”*. Neither does the Commission provide any arguments to this effect.

Indeed, given the important ramifications of the comitology decision-making process, it should be carried out with the highest public scrutiny possible, according to the ECJ case law in the *Turco* judgment. It is therefore essential that Members of the European Parliament and relevant experts and NGOs would be able to follow the decision-making process in the TCMV. In addition, transparency in the discussions of the TCMV is necessary for Members of national Parliaments to check that their Member State representatives are following the lines drawn by their governments or by their respective national majorities.

Furthermore, the Commission argues that *“In all of the above-mentioned files, the Committee has provided its opinion. However, the scrutiny by the European Parliament and the Council is still ongoing. Consequently, the decision-making process cannot be considered as finalised, as none of the above-mentioned legislative acts have been adopted by the Commission.”* However, if this logic is followed, we would not be able to get public access to the information until the full legislative procedure is concluded, which denies us the necessary information to have an informed public debate and to participate in that decision-making process.

From a Parliamentary perspective, having this information would give MEPs the opportunity to properly scrutinise how decisions are being taken, with a view to informing the European Parliament's position on the matter during the consent procedure.

I would also like to raise the issue of the incompatibility between the Standard Rules of Procedure for Committees, which state that summary records of the meetings shall not mention the position of individual Member States in the Committee's discussions, and the spirit, letter and case-law around the access to documents Regulation 1049/2001. We ask that the European Ombudsman assess the validity of the Commission's argumentation on this point and, where applicable, make recommendations aimed at solving this contradiction between the Rules of Procedure and the Access to Documents Regulation.

### **Overriding public interest**

The Commission concludes that there is no overriding public interest in the information that has been redacted. Our analysis is different: the Dieselgate scandal resulted in concrete, negative impacts for the public interest in terms of worsening public health and undermining consumer rights. It also had a negative impact on citizens' perceptions of the role of regulators, given the ease with which emissions regulations were flouted. All of these impacts on the public interest need to be dealt with in a meaningful way - and transparency to ensure accountability is the best place to start.

There is also therefore a clear public interest in accessing information about the Dieselgate scandal, and about how it could - or could not - have been prevented. The existence of an overriding public interest in the documents requested is evidenced, in part, by the depth and frequency of news reports focussing specifically on the subject. Indeed, the public interest was so high that the European Parliament even set up a specific inquiry committee to investigate the facts.

The controversy around the RDE II vote on conformity factors is also an indication of the enormous public interest in transparency in this case. During the vote, the original intentions of the legislator were undermined through the comitology process thanks to the creation of a conformity factor, which de facto changed the limits that had previously been approved. This has led several EU cities to take actions for annulment before the ECJ. Were these types of discussions to take place in conditions of greater transparency and accountability, the likelihood that the legislator's intentions could be undermined in this way again would be severely diminished.

Finally, it is worth making the point that, despite this uncommonly high public interest, even the Members of the inquiry committee were prevented from accessing those documents under normal conditions. This is despite the fact that the documents are not classified, which raises serious questions about the status of confidential yet unclassified documents.

It is perhaps not a surprise therefore that one of the key recommendations of the inquiry committee is that all minutes of the TCMV should be made public. I hope that this complaint contributes to ensuring that this will be the case in the future.

### **Conclusion**

For all the reasons set out above, I believe that the TCMV and other relevant working groups should be more transparent in their functioning. As recommended by the European Parliament in the EMIS inquiry recommendations, the lists of participants and minutes of the meetings of comitology committees should be made public as a matter of course. Consent should be obtained as a condition of participation in these technical meetings. Without this, we cannot achieve the desired levels of Parliament scrutiny from the EU and national Parliamentarians, and neither can businesses, NGOs or citizens participate in the EU's decision-making processes. To restore confidence in regulators, protect the rights of consumers, defend public health and hold those responsible to account, transparency and accountability are paramount.