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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2016/1151**

Dear Ms Delory, Mr Haverkamp, Mr Swahn,

I refer to your letter of 27 May 2016, registered on the same date, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 8 March 2016, addressed to the Directorate-General for Energy (DG ENER), you requested access to:

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

- 1) [a]n overview of and (...) all national programmes as notified to the Commission under art. 13(1) 2011/70/EURATOM, and national reports received by the European Commission from the member States under art. 14(1) 2011/70/EURATOM (...).

This part of your request relates therefore to three categories of documents:

- 1(a) National programmes notified by the relevant Member States;
 - 1(b) Implementation reports submitted by the Member States;
 - 1(c) Overview (prepared by the Commission) of the programmes and reports.
- 2) [a] full break-down overview of all radioactive waste held by each Member State according to radioactive waste category (low-, mid-, high-level waste; short-lived, medium-lived, long-lived waste), as well as totals for each category for the EU. As far as this category of documents is concerned, you explained that [i]f such a breakdown cannot be given for certain Member States, [you] request (...) the explanation of the Member State why this information has not been reported

DG ENER identified the following categories of documents as falling into the scope of your request:

- 27 programmes (draft or final versions) for the Responsible and Safe Management of Spent Fuel and Radioactive Waste, notified by the Member States³ in line with the requirement laid down in Article 13(1) of Directive 2011/70/EURATOM⁴;
- 28 implementation reports submitted by all Member States, in accordance with Article 14(1) of the above-mentioned Directive.

All the above-mentioned documents were submitted to the Commission by third parties. Having consulted the documents' originators (i.e. the relevant national authorities), DG ENER, by letter of 19 May 2016:

Documents belonging to category 1(a):

- granted full access to the programmes notified by 22 Member States⁵;
- granted partial access to the programme notified by Romania (RO). DG ENER informed you that [document originator] *asked the Commission to redact sensitive parts of the document before release as they contain sensitive information covered by the exception of Article 4(1) of Regulation 1049/2001;*

³ All Member States, except for Latvia (LV).

⁴ Council Directive 2011/70/EURATOM of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste.

⁵ AT, BG, CY, CZ, DK, EE, FI, FR, DE, EL, HU, IE, LT, LU, MT, NL, PL, SK, SI, ES, SE, UK.

- informed you that the draft version of the programme notified by Croatia (HR) is publically available on the website of the Croatian Office for Radiological and Nuclear Safety (DZRNS)⁶;
- informed you that the programme notified by the Czech Republic (CZ) is currently undergoing a Strategic Environmental Assessment (SEA) process. Therefore, the released programme may not be considered as the final version.

Documents belonging to category 1(b):

- granted full access to the reports submitted by the Member States, except for the report submitted by Cyprus (CY);
- granted partial access to the report submitted by Cyprus (CY). DG ENER explained that [document originator] *asked the Commission to redact sensitive parts of the document [annex] before release as they contain sensitive information covered by the exception of Article 4(1) of Regulation 1049/2001.*

In its reply of 19 May 2016, DG ENER also informed you that, [by] *referring to the exception of Article 4(2) of Regulation 1049/2001, a few Member States [BE, IT and PT], objected to the disclosure of their programmes since it is only a draft (...).* DG ENER also informed you that no programme has been notified by Latvia and therefore, as far as this country is concerned, the Commission is not in possession of any documents falling under the scope of the respective part of your request.

DG ENER also explained in its initial reply of 19 May 2016, that in case of the above-mentioned Member States (i.e.: BE, IT, PT and LV), the Commission initiated an infringement procedure under Article 258 of the Treaty on Functioning of the EU (TFEU).

With regard to the overview of the programmes and reports and the full break-down of the radioactive waste held by each Member State (document 1(c) and document (2)), DG ENER informed you that these documents, which are currently being drafted on the basis of the information communicated by the Member States, will be made public after their submission to the European Parliament and the Council.

Through your confirmatory application, you request a review of the position of DG ENER.

Under point (1) of your confirmatory application you refer to the initial reply of DG ENER, according to which the above-mentioned released documents will be provided on a USB-key sent by the regular mail. You point out that, at the time of submitting your confirmatory application of 27 May 2016, the USB-key has not been yet delivered. I note, however, that your organisation confirmed in the message of 9 June 2016, that the above-mentioned USB-key was indeed delivered on 8 June 2016.

⁶ Državni zavod za radiološku i nuklearnu sigurnost (DZRNS).

In point (2) of the confirmatory application, you argue that (...) *disclosure of this information [i.e. the programmes and reports] to us under Regulation 1049/2001 has the same effect as publication, that is, an "erga omnes" effect. Once documents are disclosed to one applicant, they become accessible, without further analysis, to any other applicant without such an applicant having to state reasons for his/her request.* Therefore, you request that the information [i.e. the programmes and reports to which access is granted] *be published on a dedicated page on the internet.* Please note, however, that Article 10 of that Regulation envisages only two possibilities of access to documents released following the application: consulting them on the spot or receiving a copy thereof. Therefore, the proactive publication of documents (including following their release under Regulation 1049/2001), falls outside the scope of the assessment carried out under Regulation 1049/2001.

In points (3) and (4) of your confirmatory application you contest the reasoning employed by DG ENER in order to justify the refusal of access to the undisclosed parts of the programme notified by Cyprus and the report submitted by Romania. In this context, you provide detailed arguments, which I will address in part (2) of this decision.

The last point of your confirmatory application relates to documents 1(c) and (2), which, according to the reply of DG ENER, are still being drafted by the Commission (with a view to their subsequent publication), you argue in your confirmatory application that *[t]he Commission does not indicate a timeframe for this publication, nor is it specific in whether an aggregated overview of data, as requested [by you], will be included in those documents.* You therefore ask *[t]o assess whether the (temporary) refusal of DG ENER to provide [you] with the requested data is indeed warranted and in case it is, to provide us with an indication of when this information will become available (...).*

Again please note, that the above-mentioned aspect, i.e. the timeframe of the proactive publication of documents, falls outside the scope of the assessment carried out under Regulation 1049/2001.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply provided by the relevant service at the initial stage.

As part of its review, the Commission re-consulted the Romanian and Cypriot authorities regarding the possible release of the parts of the programme (Romania) and the report (Cyprus) undisclosed at the initial stage.

Following this review, which took into account the position of the Romanian Authorities, I am pleased to inform you that access to the undisclosed part of the programme notified by that Member State is granted⁷.

With regard to the undisclosed part (annex) of the report submitted by Cyprus, I regret to inform you that, having taken into consideration the position of the Cypriot authorities, I have to confirm the initial decision of DG ENER to refuse access thereto. The refusal is based on the exception relating to the protection of public security, provided for in the first indent of Article 4(1)(a) of Regulation 1049/2001.

The detailed reasons are set out below.

2.1 Protection of public interest as regards public security

Article 4(1)(a), first indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards public security,*

The undisclosed part of the report (annex) submitted by the Cypriot authorities in line with the obligation provided for in Article 14(1) of Directive 2011/70/EURATOM includes detailed information concerning disused sources. Public disclosure of the information in the annex would undermine the protection of the public interest as regards public security, in so far as it would increase the vulnerability of the sources to malevolent acts such as theft or terrorism. Therefore, the country's ability to prevent chemical, biological, radiological and nuclear (CBRN)⁸ incidents would be compromised. Even if this specific piece of information were to be redacted, it would still be possible to determine the location of the sources, by means of other information included in the report (such as the purpose of the source/device type), due to the small size of the Member State concerned and the limited number of facilities using or storing such sources.

Consequently, as the information included in the annex, if publically released, could be misused, its disclosure would undermine the protection of public security, by putting at risk the security of the Member State concerned. I consider that risk as reasonably foreseeable and not purely hypothetical.

I conclude, therefore, that access to undisclosed part (annex) of the report submitted by Cyprus must be denied on the basis of the exception laid down in the first indent of Article 4(1)(a) of Regulation 1049/2001.

⁷ Please note that the table included in enclosure no 2 to this decision supersedes the table included in paragraph 2.6.2 of the programme included in enclosure 1.

⁸ C.f. EU CBRN-E policy and action plan: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/crisis-and-terrorism/explosives/docs/20140505_detection_and_mitigation_of_cbrn-e_risks_at_eu_level_en.pdf.

Please note, that I also took into account the reference you made, in your confirmatory application, to Directive 2003/4/EC⁹. This legislative instrument is addressed to the Member States, not to the Commission, and is therefore not relevant in the context of the assessment of the present request carried out under Regulation 1049/2001.

As regards the potential application of Regulation 1367/2006¹⁰ (hereafter: Aarhus Regulation), the Commission considers that the later does not apply to EURATOM, and is therefore not applicable in the present case, which relates to the application of an instrument based on the Treaty establishing the European Atomic Energy Community (Council Directive 2011/70/EURATOM).

All the relevant provisions of Titles II, III and IV of the Aarhus Regulation (e.g. Articles 3, 4, 5, 9 and 10) apply to “Community Institutions and bodies” which, in accordance with Article 2(1)(c), include *any public institution, body, office or agency established by, on the basis of, the Treaty*. In this context, *the Treaty* was understood at the time as the reference to the EC Treaty, and should now be understood as the reference to the TFEU.

The Commission, when acting pursuant to the EURATOM Treaty, acts in accordance with the powers and the procedures envisaged in this Treaty and thus as an Institution initially established on the basis of the EURATOM Treaty. That interpretation is consistent with Article 1 of the Aarhus Regulation according to which the objective of the Regulation is to contribute to the implementation of the obligations under the Aarhus Convention to which the European Community, but not EURATOM, is the party.

The fact that the Aarhus Regulation is based exclusively on Article 175 of the EC Treaty, which is now Article 192 of the TFEU, also provides an indication that EURATOM is not covered, insofar as Article 192 of the TFEU is not covered by the provisions of the TFEU which are applicable to EURATOM, pursuant to Article 106a of the EURATOM Treaty.

The fact that the definition of *environmental information* in Article 2(1)(d)(iii) of the Aarhus Regulation includes references to *radiation* and *radiation and waste* does not affect that conclusion. Those references cannot have the effect that the Community act would govern matters falling specifically under the EURATOM Treaty.

Therefore the Commission will not address the present request with regard to Regulation 1367/2006. Nevertheless, we have applied Regulation 1049/2001, so as to grant the widest possible access in the circumstances of the present case.

⁹ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

¹⁰ Regulation (EC) No 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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(1)(a) of Regulation 1049/2001 are absolute, i.e. their applicability does not need to be balanced against any possible overriding public interest in disclosure.

4. MEANS OF REDRESS

I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the TFEU.

Yours sincerely,



For the Commission
Alexander ITALIANER
Secretary-General