15 December 2010

VIA ELECTRONIC MAIL

The Secretary-General
c/o Ms. Catherine Day
European Commission
B-1049 Brussels, Belgium
E-mail: sg-acc-doc@ec.europa.eu

RE: Confirmatory Application for Reconsideration of DG ENERGY's Partial Refusal for Access to Documents on Voluntary Certification Schemes

Dear Secretary-General:

Corporate Europe Observatory, ClientEarth, FERN, and Friends of the Earth Europe (collectively "Applicants") submit this confirmatory application for reconsideration of the denial of 22 October 2010 application requesting access to documents on voluntary certification schemes under Article 18(4) of Directive 2009/28/EC (hereinafter "RED" for Renewable Energy Directive).

On 7 December 2010, the Directorate-General for Energy ("DG ENERGY") denied our request. The proffered basis for the denial relied on an undefined argument that the Article 4(2) and Article 4(3) exceptions in Regulation (EC) No 1049/2001 applied to the withheld documents. Through this confirmatory application, Applicants respectfully request that the Secretary-General reconsider the denial and grant access to the requested documents.

FACTUAL BACKGROUND

In April 2009, the Union legislature approved RED, which is designed to promote wind power, solar energy, hydropower, and energy from biomass.[1] RED requires Member States to source 20% of their energy needs from renewables by 2020. It also outlines a 10% target for renewables in transportation, which is expected to be met through the increased use of biofuels. In Article 17 of RED, the Union legislature outlines sustainability criteria that any biofuel receiving financial support and counting toward the 10% target must meet. Voluntary certification schemes will play a prominent role within the sustainability criteria.

Under Recital 79 of RED, the Union legislature outlines the importance of the voluntary certification schemes:

> It is in the interests of the Community to encourage... voluntary international or national schemes that set standards for the production of sustainable biofuels and bioliquids, and that certify that the production of biofuels and bioliquids meets those standards. For that reason, provision should be made for such... schemes to be recognised as providing reliable evidence and data, provided that they meet adequate standards of reliability, transparency and independent auditing.

This system for verifying compliance with the sustainability criteria is further outlined in Article 18(4) of RED:

[1] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (hereinafter "RED" for Renewable Energy Directive).

> The Commission may decide that voluntary national or international schemes setting standards for the production of biomass products contain accurate data for the purposes of Article 17(2) or demonstrate that consignments of biofuel comply with the sustainability criteria set out in Article 17(3) to (5). The Commission may decide that those schemes contain accurate data for the purposes of information on measures taken for the conservation of areas that provide, in critical situations, basic ecosystem services (such as watershed protection and erosion control), for soil, water and air protection, the restoration of degraded land, the avoidance of excessive water consumption in areas where water is scarce and on the issues referred to in the second subparagraph of Article 17(7). The Commission may also recognise areas for the protection of rare, threatened or endangered ecosystems or species recognised by international agreements or included in lists drawn up by intergovernmental organisations or the International Union for the Conservation of Nature for the purposes of Article 17(3)(b)(ii).
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> The Commission may decide that voluntary national or international schemes to measure greenhouse gas emission saving contain accurate data for the purposes of Article 17(2).

To date, several applications have been submitted to the Commission seeking recognition of their certification scheme.

On 22 October 2010, Applicants submitted a request to DG ENERGY for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council, and Commission documents. The request detailed several documents for disclosure:

> We hereby request all documents related to the voluntary certification schemes seeking recognition from the Commission under Article 18 of the Renewable Energy Directive. Document means "any content whatever its medium... concerning a matter relating to the policies, activities and decisions falling within the [Commission's] sphere of responsibility." Again, it is our understanding that several voluntary certification schemes already applied for accreditation from the Commission and have submitted associated paperwork. This request seeks those submissions and any related communications and documents. In addition, we call upon the Commission to make all future applications available in a public register, including the full details and criteria of the scheme. This will facilitate transparency and effective public participation in the reviewing process.
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> We also request a list of all meetings, including full minutes, held between the Commission and representatives of voluntary schemes or companies intending to develop them, including meetings and conferences organised by those organisations and/or companies, to which Commission staff has been invited.

This request implied access to the names of the schemes that have applied so far.

On 12 November 2010, DG ENERGY responded, granting itself an additional 15 working days to comply. It stated that "the matter requires further internal consultation" to explain the delay.

On 7 December 2010, DG ENERGY responded with an effective denial of the request. Although technically a partial denial, DG ENERGY substantially denied the application by withholding all consequential information, releasing instead just one document, *Assessment Framework for Voluntary Schemes*. For all other categories of documents—applications, paperwork, email communications, minutes, among others—DG ENERGY denied the request outright, arguing that those documents are covered by an exception:

> In your request you ask for disclosure of information on the draft versions of schemes and correspondence from the Commission to the owners of voluntary

schemes. In line with Article 4(4) of the aforementioned Regulation, the Commission had to consult with these third parties with a view to assessing whether the document may be disclosed.

The relevant third parties objected to disclose the schemes in this phase of the process, but were supportive of disclosure of (part of) the final draft of their schemes. It was highlighted by many of them that they would welcome engagement with any other party to discuss the activities of the voluntary scheme.

Based on the reply of the third parties the Commission undertook its own assessment whether disclosure of the requested [documents] was justified by the exceptions listed in Art. 4 paragraphs 2 and 3 of Regulation (EC) No 1049/2001 regarding public access to European Parliament and Commission documents. In its Article 4(2) it is stated that *the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property unless there is an overriding public interest.*

Paragraph 3 of the same Article further clarifies that access to a document, drawn up by an institution for internal use or received by an institution, which *relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

The practical effect of this denial is to preclude access to any substantive documentation that would allow the public to meaningfully engage in the environmental decision-making process with respect to certification schemes. Even a list of names of the schemes has not been produced, making it impossible to have any "engagement [..] to discuss the activities of the voluntary scheme".

With this confirmatory application for reconsideration, Applicants now request that the Secretary-General reverse this improper denial and grant access to all documents requested by Applicants.

VIOLATIONS OF REGULATIONS PROVIDING PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION

In denying the request, DG ENERGY violates two bedrock regulations providing access to environmental information. The first is Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (hereinafter "Public Access Regulation"), which establishes the right of public access to environmental documents. It ushered in a new era of accessibility and legitimacy to Community institutions,[2] codifying the principles of openness, transparency and democracy to promote legitimacy, accountability, and effectiveness in Community decision-making. It also reaffirmed the "right" of public access to documents.[3]

The second is 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 (hereinafter "Aarhus Regulation"), which gives the public's right to environmental information fuller effect when relating to environmental

[2] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (hereinafter "Public Access Regulation"), Recital 3.
[3] Public Access Regulation, Recital 4.

information in the possession of Community institutions.[4] The Aarhus Regulation was adopted five years after the Public Access Regulation, reaffirming and strengthening these principles under its first pillar, "access to environmental information."[5] Together, these regulations grant to Applicants the right to the documents and environmental information sought.

DG ENERGY claimed the Article 4(2) and Article 4(3) exceptions in the Public Access Regulation in refusing the request.

The Article 4(2) exception allows for denial when disclosure "would undermine the protection of... commercial interests of a natural and legal person, including intellectual property." Where the environmental information concerned is information related to emissions into the environment, however, the exceptions in Article 4(2), first and third indents for the protection of commercial interests, inspections, and audits are prohibited:

> 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 Community law, an overriding public interest in disclosure *shall be deemed to exist* where the information requested relates to emissions into the environment.[6]

The Aarhus Regulation creates a statutory overriding public interest in disclosure: "an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment."[7] There is no legal basis for an institution to withhold documents containing environmental information relating to emissions into the environment under a prohibited exception.

The Article 4(3) exception allows for denial when disclosure would seriously undermine the institution's decision-making process:

> Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
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> Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The courts have interpreted this to establish an obligation to disclose the basis for the denial.[8] In other words, Article 4(3) contains a "seriously-undermine standard" that must be met. If a document either "relates to a matter where a decision has not been taken" or contains "opinions for internal use as part of deliberations and preliminary consultations," the institution must disclose the document unless it would seriously undermine its decision-making process. The courts have found that the exception "must be interpreted and applied strictly."[9] The word "seriously"

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[4] 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 (hereinafter "Aarhus Regulation").

[5] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (hereinafter "Aarhus Convention"), Article 1.

[6] Aarhus Regulation, Article 6(1)(emphasis added); *see also* Aarhus Regulation, Recital 15.

[7] Regulation (EC) No 1049/2001, Article 6(1).

[8] Case T-264/04 *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36, *citing* Case T-187/03 *Scippacercola v Commission* (2005), paragraph 66; *See also* Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007).

[9] Case C-64/05 P *Kingdom of Sweden v Commission of the European Communities and Others* (2007), paragraph 66; *See* Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union* (2008)

connotes a strong presumption toward disclosure, in line with the Public Access Regulation's stated purpose in the preamble to "give the fullest possible effect to the right of public access to documents,"[10] taken to mean that "all documents of the institutions should be accessible to the public."[11] The recitals further clarify that the exception only entitles institutions "to protect their internal consultations and deliberations where *necessary* to safeguard their ability to carry out their tasks."[12] As a result, under the Public Access Regulation, only in very rare instances is denial warranted under this exception – where it would *seriously undermine* the decision-making and withholding information is *necessary* to prevent that.

In addition, EU law provides a special rule of statutory interpretation applicable to requests for environmental information under the Aarhus Regulation for environmental information:

> As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.[13]

The term "environmental information" is expansively defined to include "reports on the implementation of environmental legislation,"[14] "the state of the elements of the environment... and the interaction among these elements,"[15] and "measures (including administrative measures)... and activities affecting or likely to affect [the environment] as well as measures or activities designed to protect those elements."[16]

In its performance and response to the request for access, DG ENERGY committed several violations that compel reconsideration and, in the final analysis, disclosure. These violations are addressed in turn.

I. Article 4(2) Exception Protecting Commercial Interests Cannot Be Claimed Here Because The Requested Documents Relate to Emissions Into the Environment

As noted above, for those submissions seeking to verify compliance with Article 17(2) of RED, the Article 4(2) exception protecting commercial interests cannot be claimed. The Aarhus Regulation deems an overriding public interest in disclosure to exist where the request relates to emissions into the environment. Article 17(2) of RED sets out the GHG-savings threshold, requiring biofuels to reduce GHG emissions by certain percentages over the fossil fuel comparator. As a result, it relates to emissions into the environment and an overriding public interest is deemed to exist.

For those submissions seeking to verify compliance with the sustainability criteria other than Article 17(2) of RED, the only commercial interests claimed are unfounded and hypothetical at best. Indeed, it is unclear what the only Commission statement on the commercial interests affect—that "disclosure would inevitably affect commercial secrets"—actually means. This statement of reasons is inadequate on its face.

DG ENERGY's response fails to provide a detailed statement with reasons for withholding each specific requested document included in that response. On the contrary, it merely makes a speculative and declarative statement that it would "inevitably affect commercial interests." The underlying reasons must be divulged, in detail, with respect to each document withheld.

[10] Public Access Regulation, Recital 4.
[11] Public Access Regulation, Recital 11.
[12] Public Access Regulation, Recital 11 (emphasis added).
[13] Aarhus Regulation, Article 6(1)(emphasis added); *see also* Aarhus Regulation, Recital 15.
[14] Aarhus Regulation, Article 2(1)(d)(iv).
[15] Aarhus Regulation, Article 2(1)(d)(i)
[16] Aarhus Regulation, Article 2(1)(d)(iii).

II. Article 4(3) Exception Is Inapplicable Because the Requested Documents Do Not Seriously Undermine Decision-making

DG ENERGY's claim to the Article 4(3) exception is improper because it fails to meet the 'seriously-undermine standard' in the exception. In other words, the exceptions may only be claimed in instances in which it would seriously undermine the commercial interests or the institution's decision-making. The burden to meet the standard rests with the institution. The courts have found that the exception "must be interpreted and applied strictly."[17] As noted above, the word "seriously" connotes a strong presumption toward disclosure, in line with the Public Access Regulation's stated purpose in the preamble to "give the fullest possible effect to the right of public access to documents,"[18] taken to mean that "all documents of the institutions should be accessible to the public."[19] This connotes a grave or acute impact from the release of the document that would effectively preclude the institution's ability—here, the Commission—to make decisions. The recitals further clarify that the exception only entitles institutions "to protect their internal consultations and deliberations where *necessary* to safeguard their ability to carry out their tasks."[20] The result is that only in very rare instances would disclosure of a document *seriously undermine* the decision-making and its withholding be *necessary* to safeguard their ability to carry out their tasks. Although there may be instances in which the Article 4(3) exceptions apply to environmental information, especially that relating to emissions in the environment, this request is not one of them.

The only reasons offered by DG ENERGY are inadequate as a matter of law: "No information about the content of the schemes or the Commission's interaction with the owners or developers of schemes can be disclosed at this stage [because]... disclosure would inevitably affect... the internal decision making procedure of the Commission." DG ENERGY violated its obligation to provide cognizable reasons that allow Applicants to understand the origin and grounds for how decision-making would be seriously undermined. For the 'seriously-undermine standard' to have any force and effect, denials must be supported with reasons that would allow the aggrieved party to understand the basis for how decision-making would be undermined. This is what the interplay between the Article 4 exceptions and Article 7(1) requires. Here, however, Applicants are left to divine or intuit how such disclosure would seriously undermine the institution's decision-making process: the Commission simply states that "[w]e do not consider there is an overriding public interest to make these documents public at this time. As the Court stated in *Kingdom of Sweden v. Commission of the European Communities and Others*, it "is apparent in particular from Articles 7 and 8 of the regulation, the institution is itself obliged to give reasons for a decision to refuse a request for access to a document."[21]

III. Failure to Provide Detailed Reasons for Withholding the Requested Documents

DG ENERGY failed to provide detailed and cognizable reasons for denying the application. The reasons justifying a claim to an exception under Article 4(3) must be explicitly stated. Article 7 sets out the process and requirements to deny a request:

> 1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, 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* and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

[17] Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007), paragraph 66; Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council of the European Union* (2008)
[18] Public Access Regulation, Recital 4.
[19] Public Access Regulation, Recital 11.
[20] Public Access Regulation, Recital 11 (emphasis added).
[21] Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007), paragraph 89.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.
3. In exceptional case, for example in the event of an application relating to a very long document of to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that *detailed reasons are given*.
4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.[22]

The courts have interpreted this to require detailed reasons for the denial. In *Kingdom of Sweden v. Commission of the European Communities and Others*, the European Court of Justice found that "as is apparent in particular from Articles 7 and 8 of the regulation, the institution is itself obliged to give reasons for a decision to refuse a request for access to a document."[23] As a result, the court found that "it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal."[24] In *WWF European Policy Programme v. Council of the European Union*, the court found that this obligation to state the reasons for denial is "to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested."[25]

Despite availing itself of additional time to respond, DG ENERGY offers only a perfunctory and categorical rebuff. In fact, DG ENERGY expresses the reasons for withholding the documents under both the Article 4(2) and (3) exception in a mere 90 words:

> No information about the content of the schemes of the Commission's interaction with the owners or developers of schemes can be disclosed at this stage. As disclosure would inevitably affect commercial secrets and the internal decision making procedure of the Commission.
>
> The voluntary schemes themselves are the result of a design process from the scheme developers which encloses specific design features that upon disclosure could harm their commercial interests. Also disclosure of specific discussions between Commission and schemes on key parts of the schemes would be problematic in this sense.

This statement of reasons is inadequate on its face. Article 7(1) places on DG ENERGY the obligation to "state the reasons for a total or partial refusal."[26] Moreover it represents an outright dismissal of the "concept of openness"[27] "transparency of the decision-making process,"[28] and the "right of public access to documents."[29] There is no detailed statement with reasons for withholding any specific requested document included in that response. The underlying reasons must be divulged, in detail, with respect to each document withheld. As it stands now, however, DG ENERGY's attempt to claim an Article 4 exception without providing even the most cursory elaboration for its claims should be rejected outright.

IV. Failure to Provide a Concrete, Individual Assessment for Each Document

[22] Public Access Regulation, Article 7 (emphasis added).
[23] Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007).
[24] Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007), paragraph 69.
[25] Case T-264/04, *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36, *citing* Case T-187/03, *Scippacercola v Commission* (2005), paragraph 66.
[26] Public Access Regulation, Article 7(1).
[27] Public Access Regulation, Recital 1.
[28] Public Access Regulation, Recital 3.
[29] Public Access Regulation, Recital 4.

It is well-settled that an institution must carry out a concrete, individual assessment of the content of the documents referred to in the request.[30] Courts have found that "where an institution receives a request for access under [the Public Access Regulation] it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request."[31] This is made apparent in "that all exceptions mentioned in Article 4(1) to (3) are specified as being applicable to 'a document.'"[32] On this point, the Court has rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, "since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents."[33]

A concrete, individual assessment is also needed to ensure compliance with other provisions of the Public Access Regulation, including whether redaction is appropriate under Article 4(6), the period of time protection is justified under Article 4(7), and compliance with obligation to provide "public access to a register" under Article 11(1) with an itemised list of the documents.[34] The purpose of this assessment must be forwarded to the applicant to serve as the basis for determining the applicability of the exception with respect to the document in question.[35] In response to Applicants' request for access, however, these concrete, individual assessments were neither made nor made available. Indeed, DG ENERGY failed to even identify by name the parties making the submissions.

DG ENERGY, for its part, assessed the documents in the aggregate, rather than individually, if at all. There is no list of documents and the exceptions are claimed quixotically for all documents and portions thereof without identifying those to which the exceptions apply. This response evinces a failure to assess in concrete and individual manner each document requested, as required.[36] Nor did DG ENERGY provide an itemised list of the documents on which the assessments were purportedly performed and the reasons for the claim to exception for each document in question. In addition, no public access to a register of documents under Article 11(1) was likewise provided. As a result, Applicants are precluded from being able to determine for each document whether the decision is well founded or whether it is vitiated by an error which may permit its validity to fall within Article 4(2) or Article (3) to be contested.[37]

V. Failure to Consider Redaction of Documents to Allow Disclosure or Determine the Period of Application of the Exception

Only in the rarest of occasions are documents with environmental information, especially those with information relating to emissions in the environment, to be withheld from public access. This request is not one of them. Nevertheless, to the extent that any document was properly withheld, DG ENERGY failed to consider redaction of the documents or determine the period of application of the exception.

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[30] Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities* (2005), paragraphs 69-74; *see also* Case T-188/98 *Kuijer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

[31] Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities* (2005), paragraphs 69-74; *see also* Case T-188/98 *Kuijer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

[32] *See* Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities* (2005), paragraph 70.

[33] Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities* (2005), paragraph 73, *citing* Case T-123/99, *JT's Corporation v. Commission of the European Communities* (2000), paragraph 46.

[34] *See* Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities* (2005), paragraph 73; *see also* Public Access Regulation, Article 4(6), Article 4(7), and Article 11(1).

[35] *See, e.g.,* Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities* (2005), paragraphs 69-74; Case T-188/98 *Kuijer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

[36] Public Access Regulation, Article 4(3); Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities* (2005), paragraph 70.

[37] Case T-264/04, *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36, *citing* Case T-187/03, *Scippacercola v. Commission* (2005), paragraph 66.

Upon a finding that documents with environmental information may be withheld, two additional determinations must be made. First, under Article 4(6), "if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released."[38] In *WWF European Policy Programme v. Council of the European Union*, the Court interpreted this language to mean that documents must be redacted, if possible, to allow their disclosure:

> It is clear from the wording itself of Article 4(6) of [the Public Access Regulation] that an institution is required to consider whether it is appropriate to grant partial access to documents requested and to confine any refusal to information covered by the relevant exceptions. The institution must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved where all that is required of the institution is to blank out the passages which might harm the public interest to be protected.[39]

This requirement is further supported by the restrictive interpretation afforded to documents containing environmental information, especially information related to emissions in the environment.[40] DG ENERGY has failed to consider redaction here.

Second, under Article 4(7), the exceptions "shall only apply for the period during which protection is justified on the basis of the content of the document."[41] This determination is, likewise, document and content specific. But DG ENERGY states:

> Finally, the Commission intends to publish the final version of voluntary schemes that seek recognition after the reviewing process is completed. Before doing so, the Commission intends to give owners of schemes the possibility to indicate what parts of the scheme cannot be disclosed for reasons of confidentiality and/or commercial sensitivity. The Commission will then assess such claims, decide whether they are justified and publish the schemes on its website. You will be informed of this in due course. By doing so the Commission ensures the maximum transparency possible in this process.

This response is inadequate several reasons. First, it does speak to the documents actually requested, which are the applications and associated documents already submitted to the Commission and email communications. Instead, it refers to hypothetical "final versions of voluntary schemes" that have yet to be generated. Second, it does not outline a timeframe for releasing the documents actually requested. The above statement, for example, makes no mention of when the emails will be made available. DG ENERGY simply failed to perform either analysis and make it available to Applicants in its response.

VI. Any Claim to Exception Is Defeated by an Overriding Public Interest in Disclosure

The Public Access Regulation also contains an exception to the Article 4(2) and Article 4(3) exceptions. In other words if a document would undermine the protection of a cognizable commercial interest or falls under the narrow category of documents whose disclosure would *seriously undermine* the decision-making process and whose withholding is *necessary* to carry out the Commission's tasks, an "overriding public interest in disclosure" will nevertheless compel its release. The burden on an institution claiming the Article 4(2) and Article 4(3) exceptions with respect to environmental information is heightened. Here, the disclosure of the requested documents falls within the exception to the Article 4(2) and Article 4(3) exception since there is an overriding public interest in disclosure.

[38] Public Access Regulation, Article 4(6).
[39] Case T-264/04, *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36, *citing* Case C-353/99 P, *Council v. Hautala* (2001), paragraph 29.
[40] Aarhus Regulation, Recital 15 and Article 6(1).
[41] Public Access Regulation, Article 4(7).

As a general matter, the public interest in reducing greenhouse-gas emissions to curb climate change is irrefutable. In fact, at the time of submission of this confirmatory application, the climate negotiations in Cancun have just come to an end. The public has every right to be fully informed and involved to ensure that EU climate policies, such as verification, comply with the GHG-savings threshold in Article 17(2) of RED. The public also has an irrefutable interest in ensuring that biofuel targets do not result in the destruction of forests and loss of biodiversity.[42] The increase in biofuel consumption without adequate safeguards or verification, however, will undermine these interests. Both these interests—the change in the Earth's climate and the conservation of biological diversity—are recognised as "common concern[s] for humankind" in treaties signed and ratified by the European Union.[43]

More specifically, however, provisions in RED and FQD set targets that artificially increase the demand for biofuels. That is their purpose under the assumption that it will reduce greenhouse-gas emissions. But several scientific studies published in reputable periodicals have concluded that biofuels may actually increase greenhouse-gas emissions, especially when taking into consideration the impacts of indirect land-use change.[44]

CONCLUSION

With this confirmatory application for reconsideration, Applicants respectfully request that the Secretary-General grant access to the requested documents and information therein.

Sincerely,

Adrian Bebb, Friends of the Earth Europe
Veerle Dossche, FERN
Tim Grabiel, Senior Lawyer, ClientEarth
Nina Holland, Corporate Europe Observatory

[42] RED, Recital 69; FQD, Recital 11.
[43] United Nations Framework Convention on Climate Change (UNFCCC), Recital 1; Convention on Biological Diversity (CBD), Recital 3.
[44] *See, e.g.,* Searchinger and Fargionne, Science Magazine (2008); The Gallagher Review for the UK Government (2008); The German Study by WBGU (2008); UNEP Sensitivity Analysis of GHG balances of Biofuels (2009).