

TRANSPARENCY OF DATA IN THE REGULATION OF VEHICLE EMISSIONS IN THE EUROPEAN UNION AND UNITED STATES

This memo has been prepared by *Défense Terre* as commissioned by the ICCT

TABLE OF CONTENTS

Executive Summary	1
Introduction.....	2
General Legal Framework on Access to Environmental Information in the EU	4
I. Access to Environmental and Other Information Held by EU Institutions.....	4
A. Regulation (EC) No 1049/2001.....	4
B. Aarhus Regulation	5
C. Procedure for Requesting Access to Information Held by EU Institutions.....	8
II. Access to Environmental Information Held by Member States.....	9
A. Environmental Information Directive	9
B. Procedure for Requesting Access to Information Held by Member States	11
Specific Legal Frameworks on Access to Information on Vehicle Type-Approval in the EU.....	13
I. Specific Rules on Confidentiality.....	13
II. Analysis of Accessibility of Key Information Related to Vehicle Type-Approval.....	14
A. Applications and Certificates for Type-Approval	15
B. Test Reports	16
C. NO _x After Treatment Devices.....	17
D. BES and AES.....	17
E. Software and Algorithms	18
F. Market Surveillance and Compliance Verification	18
G. Measures Related to Non-Compliance with EC Type-Approval Certificates.....	18
General Legal Framework on Access to Information in the United States.....	20
I. Publicly Available Vehicle Certification and Compliance Information	20
II. Information Potentially Available under Freedom of Information Act.....	20
III. Freedom of Information Act Exemptions	21
A. Exemption 3- Specifically Exempted Information	22
B. Exemption 4 - Trade Secrets and Commercial or Financial Information.....	24
IV. Freedom of Information Act Request Procedure.....	25
Comparison of the Legal Frameworks for Access to Information in the EU and the U.S.	26

EXECUTIVE SUMMARY

There are significant differences in regards to the transparency of information on type-approval and vehicle emissions in the European Union (EU) and the United States (U.S.).

Some of these differences are related to the substantive rights afforded to the public to access such information whereas others relate to differences in the political structures themselves – the result being that the system in the U.S. is more transparent than in the EU. Given the ongoing revision of legislation related to type-approval that is currently before the European Parliament and the Council of the European Union, in the interests of promoting transparency, the EU would do well to look across the Atlantic for inspiration in this regard.

This legal note reviews the general and specific legal frameworks governing access to information on type-approval and vehicle emissions in both the EU and U.S., drawing comparisons along the way. It must be prefaced with the observation that the public's efforts to gain access to this type of information in the EU have not been, to date, as robust as in the U.S., which can be ascribed to challenges presented by the overall framework for EU type-approval, whereby competencies are divided among public authorities in 28 Member States, and by the nature of the EU itself. This contrasts sharply to the situation in the U.S., which benefits from the central role played by the U.S. Environmental Protection Agency (EPA). In short,

- Even under the Proposed EU Type-approval Regulation, a significant amount of key information will still be held by Member States and not EU institutions. To the extent that certain vehicle type-approval information is held by Member States, it is often more difficult to obtain.
- From the perspective of certification and compliance monitoring, EPA receives all of the key information it needs under Part A of the Clean Air Act. The explicit requirement that all of this information, to the extent it is “emissions data” as that term is expansively interpreted by EPA, be made publicly available greatly increase the overall transparency of the regulatory framework.
- The explicit requirement in Commission Regulation (EU) 2016/646 that information disclosed to approval authorities related to Base Emission Strategies (BESs) and Auxiliary Emission Strategies (AESs) “remain strictly confidential” potentially undermines the entire scheme for monitoring and enforcing emissions standards in the EU.

The main recommendations that can be drawn from this comparison are threefold.

First, the EU should ensure that information related to type-approval and vehicle emissions is brought together and held by the Commission, thus providing a single point of access for the public. This would overcome many barriers, both linguistic and bureaucratic, that work to prevent transparency and access.

Second, the EU would be well served by clarifying the open treatment of this type of information when requested by the public, in particular as it relates to the application of the exceptions to the general rule of disclosure. As it stands, the varied interpretations across Member States and the Commission of the exceptions to disclosure—and whether an overriding public interest nevertheless exists—undermines uniform and equal access across the EU.

Third, absent clarification on the open treatment of this type of information, the EU should resist the urge to include specific references on confidentiality that serve to limit the public's access, especially with regards to the use of defeat devices. Often times the right to access this information can hinge on the inclusion or exclusion of just a few words, sometimes inserted innocuously and other times insidiously. As it stands, the general legal framework governing access to information in the EU should be sufficient to ensure the public's right to access, but significant uncertainties enter into the equation once specific references to heightened confidentiality are included in other legislation.

INTRODUCTION

The legal frameworks governing public access to vehicles emissions vary significantly in the EU and U.S. This is largely due to the nature of the EU, a supranational and intergovernmental union, with competencies related to type-approval divided among public authorities in its 28 Member States – with only a limited role reserved for the European Commission. This contrasts to the U.S., a federal republic with a strong executive, whereby competencies related to type-approval are centralized in the EPA – as opposed to, by way of analogue, its 50 state governments. That is not to say that the EU legal framework cannot move toward more transparency, but that there are structural differences that contribute to the current disparities.

For example, in the EU, the legal framework governing access to information varies depending on the entity holding the information and the type of information.

For information held by European institutions, such as the European Parliament, Council and Commission, the general legal framework is set forth in *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* (“Regulation (EC) No 1049/2001”).¹ As it pertains to environmental information, Regulation (EC) No 1049/2001 is supplemented by *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* (“Aarhus Regulation”).²

For information held by public authorities at the national, regional or local levels, the general legal framework is set forth in national and subnational legislation of the Member State. As it pertains to environmental information held by public authorities in Member States or other public authorities at the regional, national or local level, *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* (“Environmental Information Directive”) establishes the applicable legal framework for access to that information,³ which is then transposed into national legislation.

But this general legal framework governing access to information in the EU and Member States can be supplanted by more specific legal frameworks in other laws that set forth different levels of access, as detailed below. Where it concerns information relating to vehicle type-approval, specific rules setting forth different levels of access to certain information relating to vehicle type-approval are included in the following adopted or proposed EU legislation:

- *Directive 2007/46/EC on the Approval and Market Surveillance of Motor Vehicles and their Trailers, and of Systems, Components and Separate Technical Units Intended for Such Vehicles* (“EC Type-Approval Directive”);⁴
- *Proposal for a Regulation on the Approval and Market Surveillance of Motor Vehicles and their Trailers, and of Systems, Components and Separate Technical Units Intended for Such Vehicles* (“Proposed EU Type-Approval Regulation”);⁵
- *Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information* (“Regulation (EC) 715/2007”);⁶ and
- *Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information* (“Commission Regulation (EC) 692/2008”).⁷

All this contributes to a labyrinthine legal framework that must be navigated when accessing information on vehicle emissions in the EU. This contrasts significantly to the situation in the U.S. whereby the information is held by the EPA.

In the U.S., vehicle certification is the analogue to vehicle type-approval in the EU. Vehicle certification and compliance with emissions standards is governed by the Clean Air Act (CAA), 42 U.S.C. §7401 *et seq.* The CAA is administered by the EPA, and thus EPA interprets and implements the CAA through the promulgation of regulations found in 40 C.F.R. Part 86, *Control of Emissions from New and In-Use Highway Vehicles and Engines*.

EPA is a federal agency. In the U.S., and thus the general legal framework governing public access to the records of any federal agency set forth in the Freedom of Information Act (FOIA), 5 U.S.C. §552, regulate public access to information held by EPA.⁸ FOIA also sets forth the process by which members of the public can obtain agency records. However, the general legal framework of FOIA can be explicitly displaced by a more specific provision in another federal statute, such as the CAA, applicable to specific information in agency records – similar to the EU in this regard. As a result, while FOIA provides the general framework and sets out a process for requesting information in EPA's records, in many cases it is the CAA and 40 C.F.R. Part 86 that dictate whether that information is publicly available.

This note begins by reviewing the existing general legal framework for access to environmental information held by EU institutions and Member States (and subsidiary public authorities), analyzing how public access to information relating to vehicle type-approval are modified by the relevant adopted and proposed EU legislation. It then reviews the relevant laws governing public access to environmental information relating to vehicle certification in the U.S. It concludes by comparing the EU and U.S. systems.

GENERAL LEGAL FRAMEWORK ON ACCESS TO ENVIRONMENTAL INFORMATION IN THE EU

In the EU, the legal framework governing access to information, in general, and environmental information, in particular, differs depending on whether that information is held by EU institutions or public authorities of Member States. For EU institutions, the legal framework for accessing information is established by Regulation (EC) No 1049/2001, which is supplemented by the Aarhus Regulation when it concerns environmental information. For public authorities of Member States, the legal framework for accessing information is typically established by national and subnational legislation. To the extent the requested information is considered environmental information, the Environmental Information Directive sets out the applicable legal framework, which must be transposed into the national legislation by Member States.

I. ACCESS TO ENVIRONMENTAL AND OTHER INFORMATION HELD BY EU INSTITUTIONS

A. REGULATION (EC) No 1049/2001

Regulation (EC) No 1049/2001 establishes the right to public access to all documents held by EU institutions, *i.e.* “documents drawn up or received by an [EU] institution and in its possession.”⁹ “In principle, all documents of the institutions should be accessible to the public”¹⁰ and the general rule is to provide the information to the requesting party unless an exception applies that allows its withholding.

The exceptions to this rule are contained in Article 4 of Regulation (EC) No 1049/2001, with the most relevant exceptions for vehicular emissions data being:

2. 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,
 - court proceedings and legal advice,
 - the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. 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.

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 Court of Justice of the European Union (CJEU) has found that, “since the exceptions derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly.”¹¹

The most relevant exception to public access to documents relating to vehicle type-approval and emissions is the commercial-interest exception under first indent of Article 4(2) of Regulation (EC) No 1049/2001. This does not foreclose other exceptions from also being claimed, depending on the timing of the request (during the decision-making process, and even after if it would seriously undermine decision-making) or where related to enforcement (court proceedings) or compliance (the purpose of inspections, investigation and audits). In all instances, an overriding public interest in disclosure could override these claims to

exceptions, although this has proven difficult to show unless an overriding public interest in disclosure is deemed to exist, as discussed in Section I.B below.

The commercial-interests exception allows EU institutions to “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 in disclosure.”¹² As one court put it, “[w]ith respect to this exception, it must be justified by a specific and actual undermining of the commercial interest [since] [i]t is well-established under EU law that just because information relates to a company and its business relations does not mean it constitutes ‘commercial interests.’”¹³

Where an EU institution receives a document from a third party, Article 4(4) of Regulation (EC) No 1049/2001 states:

As regards third-party documents, the institution shall consult the third party with a view to assessing whether [the commercial-interest] exception ... is applicable, unless it is clear that the document shall or shall not be disclosed.¹⁴

Further, Regulation (EC) No 1049/2001 stipulates that “[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.”¹⁵ Thus, EU institutions are required to release redacted documents where only portions thereof are covered by an exception.

Where an EU institution receives a document from a Member State, Article 4(5) of Regulation (EC) No 1049/2001 states that the “Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.”¹⁶ In that instance, the CJEU has held that the EU institution must notify the Member State concerned and commence a dialogue without delay with a view to assessing the application of any exceptions within the applicable prescribed time-limits for responding to the application.¹⁷ If the Member State objects to disclosure, it is obliged to state reasons for that objection with reference to the applicable exception.¹⁸ Where the EU institution cannot accept a Member State’s objection to disclosure—either for failure to provide reasons or to put forward reasons in terms of the listed exceptions—the EU institution must, if it considers none of the exceptions applies, provide access to the requested document.¹⁹ Where the Member State provides reasons showing an exception applies, the EU institution is consequently obliged to refuse access and shall communicate those reasons to the applicant,²⁰ who may then seek judicial review of the decision.²¹

In order to facilitate citizens’ rights to access documents of EU institutions, Article 11 of Regulation (EC) No 1049/2001 further requires that:

[E]ach institution shall provide public access to a register of documents. ... References to documents shall be recorded in the register without delay. ... For each document the register shall contain a reference number ..., the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register....²²

Unless governed by a more specific provision in the relevant EU legislation, each document received by or originating from the Commission relating to vehicle type-approval should be referenced in a register. In order to access such documents, citizens must apply for access to the documents following the process set forth in Articles 6-8 of Regulation (EC) No 1049/2001 as discussed in Section III, *infra*.²³

B. AARHUS REGULATION

The Aarhus Regulation modifies the legal framework set out in Regulation (EC) No 1049/2001 as it applies to environmental information held by EU institutions. It is the objective of the Aarhus Regulation to “guarantee[] the right of public access to environmental information received or produced by [EU] institutions or bodies and held by them.”²⁴

The terms “environmental information” are defined broadly and include:

[A]ny information in written, visual, aural, electronic or any other material form on:

- (i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);
- (iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;
- (iv) reports on the implementation of environmental legislation;
- (v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);
- (vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii) ...²⁵

In addition, the Aarhus Regulation expands the “databases or registers” required under Article 12 and 13 of Regulation (EC) No 1049/2001 to include, *inter alia*, “steps taken in proceedings for infringements of” EU law, “data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment” and “authorisations with a significant impact on the environment ...”²⁶

In order to give effect to its sweeping objective, the Aarhus Regulation makes several key changes to or clarifications of Regulation (EC) No 1049/2001 where it concerns environmental information.

First, Aarhus Regulation broadens the scope of EU institutions to which Regulation (EC) No 1049/2001 applies. Whereas, Regulation (EC) No 1049/2001 only applies to the European Parliament, Council and Commission as well as to similar bodies set up by a Community legal act, the Aarhus Regulation “extend[s] the application of Regulation (EC) No 1049/2001 to all other [EU] institutions and bodies.”²⁷ This, combined with the broad definition of environmental information, ensures that essentially any information held by any EU institution concerning vehicle type-approval that relates to emissions is included within the ambit of Regulation (EC) No 1049/2001 as expanded and defined by the Aarhus Regulation.²⁸

Second, the Aarhus Regulation specifically states that “[where Regulation (EC) No 1049/2001 provides for exceptions, these should apply subject to any more specific provisions in this Regulation concerning requests for environmental information.”²⁹ The right of access to documents as set out in Regulation (EC) No 1049/2001 may be limited or denied where there are explicit rules governing the specific matter at hand, under the principle that a special rule overrides a general one (*lex specialis derogat legi generali*). To the extent related to environmental information, the rules established in the Aarhus Regulation override the general legal framework governing access to documents held by EU institutions set forth in Regulation (EC) No 1049/2001.

Third, and importantly, the Aarhus Regulation limits the applicability of the commercial interest exception provided in Article 4(2), first indent, of Regulation (EC) No 1049/2001 in two ways. *First*, it requires the

exception be “interpreted in a restrictive way, taking into account the public interest served by the disclosure and whether the information requested relates to emissions in the environment.”³⁰ *Second*, when considering the commercial interest exception to the general rule of providing public access to information, it requires a finding that an “overriding public interest in disclosure” exist where the information requested “relates to emissions into the environment,” As stated in Article 6(1) of the Aarhus Regulation:

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*. 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.³¹

The determination of whether environmental information “relates to emissions in the environment” is highly relevant to the applicability of the commercial-interest exception under Article 4(2) of Regulation (EC) No 1049/2001. In a recent and much-anticipated case, *Commission v Stichting Greenpeace Nederland and PAN Europe*, decided on 23 November 2016, the CJEU broadly interpreted the term “relates to emissions into the environment,” which will have significant implications on access to information related to type-approvals going forward.³²

In the light of the objective set out in the first sentence of Article 6(1) of Regulation No 1367/2006 of ensuring a general principle of access to ‘information ... [which] relates to emissions into the environment’, that concept must be understood to include, inter alia, data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question, namely those under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used. Consequently, that concept must be interpreted as covering, inter alia, information concerning the nature, composition, quantity, date and place of the actual or foreseeable emissions, under such conditions, from that product or substance.³³

It is also necessary to include in the concept of ‘information [which] relates to emissions into the environment’ information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct, and the data relating to the effects of those emissions on the environment. It is apparent, in essence, from recital 2 of Regulation No 1367/2006 that the purpose of access to environmental information provided by that regulation is, inter alia, to promote more effective public participation in the decision-making process, thereby increasing, on the part of the competent bodies, the accountability of decision-making and contributing to public awareness and support for the decisions taken. In order to be able to ensure that the decisions taken by the competent authorities in environmental matters are justified and to participate effectively in decision-making in environmental matters, the public must have access to information enabling it to ascertain whether the emissions were correctly assessed and must be given the opportunity reasonably to understand how the environment could be affected by those emissions.³⁴

Although the CJEU also made clear that the term “relates to emissions into the environment” does not include “information containing any kind of link, even direct, to emissions into the environment,” it confirmed that “environmental information” within the meaning of Article 2(1)(d) of the Aarhus Regulation

cannot be withheld under the commercial-interest exception under first indent of Article 4(2) of Regulation (EC) No 1049/2001.³⁵ The combined effect of Regulation (EC) No 1049/2001 and the Aarhus Regulation, as interpreted by the CJEU, is to provide strong grounds that environmental information relating to emissions resulting from vehicle type-approval should be publicly available or available upon request. As a result, to the extent emissions from vehicle type-approval are considered “environmental information” under Article 2(1)(d) of the Aarhus Regulation, that information cannot be withheld even if it would undermine the protection of commercial interests – instead an overriding public interest in disclosure shall be deemed to exist—unless that information is subject to a more specific rule governing disclosure or confidentiality contained in the relevant EU legislation or the Treaties.

C. PROCEDURE FOR REQUESTING ACCESS TO INFORMATION HELD BY EU INSTITUTIONS

Articles 6-8 of Regulation (EC) No 1049/2001 establish an application and appeals process for the public to obtain access to documents from EU institutions. That process is broadly as follows:

- (1) application is submitted by the applicant to the EU institution in written form;³⁶
- (2) an acknowledgment of receipt of the application is sent from the EU institution to the applicant;³⁷
- (3) within 15 working days from registration of the application, the EU institution shall either:
 - (a) grant access to the document requested; or
 - (b) in a written reply, state the reasons for the total or partial refusal and inform the applicant of the legal remedies available
- (4) if the application is refused under 3(b), *supra*, the applicant may, within 15 working days of receiving the EU institution’s reply, make a confirmatory application asking the EU institution to reconsider its position;³⁸
- (5) within 15 working days from registration of the confirmatory application, the EU institution shall either:
 - (a) grant access to the document requested; or
 - (b) in a written reply, state the reasons for the total or partial refusal and inform³⁹
- (6) If the application is refused under 5(b), *supra*, the applicant may institute court proceedings against the EU institution under the conditions laid down in [Articles 263 and 228 of the Treaty on the Functioning of the European Union].⁴⁰

The Aarhus Regulation does not modify this process except to require the an EU institution or body that receives a request for access to environmental information held by another EU institution or body notify the applicant within 15 working days and direct the applicant to the EU institution or body which it believes has such information.⁴¹

With respect to an EU institution’s assessment of the applicant’s request, it must be a concrete, individual assessment.⁴² It is well-established that “where an institution receives a request for access under Regulation (EC) No 1049/2001 it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request.”⁴³ This is made apparent in “that all exceptions mentioned in Article 4(1) to (3) are specified as being applicable to ‘a document.’”⁴⁴ An assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents is

insufficient “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.”⁴⁵ A concrete, individual assessment is also needed to ensure compliance with other provisions of Regulation (EC) No 1049/2001, including whether redaction is appropriate under Article 4(6) and whether the period of time protection is justified under Article 4(7).⁴⁶ 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.⁴⁷

II. ACCESS TO ENVIRONMENTAL INFORMATION HELD BY MEMBER STATES

A. ENVIRONMENTAL INFORMATION DIRECTIVE

The legal framework for accessing information held by public authorities in Member States is typically established by national and subnational legislation, and is not addressed in this note. To the extent it relates to environmental information, the Environmental Information Directive establishes the public right to access to environmental information held by or for public authorities of Member States. It is the objective of the Environmental Information Directive “to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise.”⁴⁸

In principle, “[t]he right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way ...”⁴⁹ In order to fulfill this sweeping mandate, the Environmental Information Directive embraces several key concepts.

First, the Environmental Information Directive defines key terms broadly. For example, it defines “environmental information” in Article 2(1) by relying upon the same definition of those terms also found in Article 2(d) of the Aarhus Regulation.⁵⁰ It also expansively defines “public authority” in Article 2(2) as follows:⁵¹

2. ‘Public authority’ shall mean:
 - (a) government or other public administration, including public advisory bodies, at national, regional or local level;
 - (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
 - (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

The combined effect of these broad definitions of “environmental information” and “public authority” means that, in principle, information held by or for a public authority of a Member State concerning vehicle type-approval which has an impact on vehicle emissions is included within the ambit of the Environmental Information Directive and should be made available to the public upon request.

Second, after providing this broad mandate, the Environmental Information Directive provides a limited number of exceptions in Article 4 to the general rule of broad public access to environmental information held by or for public authorities.⁵² Of particular importance are the following exceptions contained in Article 4(2)(d)-(e):⁵³

2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

- (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;
- (b) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
*** **
- (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest ... ; [and]
- (e) intellectual property rights

Similar to the Aarhus Regulation, Article 4(2) goes on to state that:

The grounds for refusal mentioned in paragraphs 1 and 2 shall be *interpreted in a restrictive way*, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal.⁵⁴

Similar to the Aarhus Regulation, the Environmental Information Directive instructs that: “Member States may not, by virtue of [certain exceptions], provide for a request to be refused where the request relates to information on emissions into the environment.”⁵⁵ As the Advocate General *Commission v Stichting Greenpeace Nederland and PAN Europe* observed, in EU case law, “it is not possible ... to give a different interpretation to the emissions clause which applies to EU institutions” in the Aarhus Regulation and the nearly identical clause applicable to Member States in the Environmental Information Directive,⁵⁶ and this was effectively confirmed in *Bayer CropScience SA-NV and Stichting De Bijenstichting v College Voor de Toelating*, which was decided on the same day as *Commission v Stichting Greenpeace Nederland and PAN Europe*.⁵⁷ Both define environmental information and relating to emission into the environment similarly, and require compels of environmental information relating to emissions into the environment despite certain exceptions.

Among those exceptions in Article 4(2) of the Environmental Information Directive which are inapplicable where a request relates to information on emissions into the environment is the exception in Article 4(2)(d) for “the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest ...” However, the exception in Article 4(2)(e) for “intellectual property rights” is outside of the scope of the emissions clause in the Environmental Information Directive and is therefore applicable even when the request relates to information on emissions into the environment, although it still must be “interpreted in a restrictive way.” It is unclear how “intellectual property rights” would be defined in the context of disclosure of emissions from or devices used during vehicle type-approval—the courts have yet to review the issue—but it is likely to draw heavily upon the on definitions found in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994.⁵⁸

This contrasts with the approach taken under Regulation (EC) No 1049/2001 in which intellectual property is included within the definition of commercial interests, and for which an overriding public interest in disclosure is deemed to exist where it relates to emissions into the environment.⁵⁹ The extent to which this distinction between “commercial information” and “intellectual property rights” impacts the public right to access to environmental information concerning defeat devices and emissions during vehicle-type-approval will need to be assessed on a case-by-case basis.

Wherever the distinction is drawn, however, Article 4(4) of the Environmental Information Directive states that “[e]nvironmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested.”⁶⁰ In other words, the Environmental Information Directive requires redaction, whenever possible.

Article 7 of the Environmental Information Directive further requires Member States to make certain environmental information, subject to the exceptions in Article 4(1)-(2), available to the public without a specific request for such information:

1. Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available. ...

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.

2. The information to be made available and disseminated shall be updated as appropriate and shall include at least:
 - (a) texts of ... Community, national, regional or local legislation, on the environment or relating to it;

*** **
 - (c) progress reports on the implementation of the items referred to in (a) ... when prepared or held in electronic form by public authorities;

*** **
 - (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
 - (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;...

Thus, under Article 7, a significant amount of information on vehicle type-approval should already be made publicly available to the public by Member States.

B. PROCEDURE FOR REQUESTING ACCESS TO INFORMATION HELD BY MEMBER STATES

The Environmental Information Directive requires that “Member States should determine the practical arrangements under which such information is effectively made available. These arrangements shall guarantee that the information is effectively and easily accessible ...”⁶¹ In addition to this affirmative obligation under Article 7 to make information publicly available, the process for providing public access to other environmental information held by or for Member States is set out in Articles 3, 4 and 6.

Article 3(1) establishes the overarching principle that “Member States shall ensure that public authorities are required, in accordance with the provisions of [the Environmental Information Directive], to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.”⁶² Further, “[p]ublic authorities should make environmental information available in part where it is possible to separate out any information falling within the scope of the exceptions [listed in Article 4] from the rest of the information requested.”⁶³

Article 3(2)-(4) establish a process that can be summarized as follows:

- (1) applicant requests environmental information from the public authority;⁶⁴
- (2) the public authority shall either:
 - (a) make the environmental information available to the applicant as soon as possible or, at the latest, within one month after the receipt by the public authority;⁶⁵ or
 - (b) notify the applicant in writing of its refusal to make all or part of the information requested available and its reasons for the refusal and include information on review procedure provided for in accordance with Article 6, within one month of receiving the request;⁶⁶

- (3) if the request is refused under (2)(b), *supra*, the applicant may pursue the judicial remedies made available by the Member State in accordance with Article 6.

While each Member States' precise implementation of the access to justice provisions may differ, Article 6 of the Environmental Information Directive directs Member States to provide applicants with access to justice as follows:

1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.
2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.
3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article.

SPECIFIC LEGAL FRAMEWORKS ON ACCESS TO INFORMATION ON VEHICLE TYPE-APPROVAL IN THE EU

I. SPECIFIC RULES ON CONFIDENTIALITY

The general legal principle adhered to in the EU—*lex specialis derogate legi generalis*—under which a specific rule overrides a more general one is also applicable to the legal framework governing public access to environmental information. As a result, the legal framework governing access to information established in Regulation (EC) No 1049/2001, the Aarhus Regulation and the Environmental Information Directive only applies to the extent a more specific law on confidentiality has not been established.

For example, in *Ville de Lyon*, the CJEU found that Commission Regulation No 2216/2004, by its specific terms, governed the confidentiality of national registries under Article 19 of Directive 2003/87/EC (also known as the “ETS Directive,” which establishes the emission trading system in the EU) rather than the Environmental Information Directive.⁶⁷ The reason was because Article 19(3) of Directive 2003/87/EC specifically—and explicitly—stated it would:

In order to implement this Directive, the Commission shall adopt a Regulation... for a standardised and secured system of registries in the form of standardised electronic databases containing common data elements to track the issue, holding, transfer and cancellation of allowances, to provide for public access and confidentiality as appropriate and to ensure that there are no transfers incompatible with obligations resulting from the Kyoto Protocol.⁶⁸

In other words, the Commission adopted a specific rule on confidentiality, Commission Regulation No 2216/2004, because it was directed to do just that. Commission Regulation No 2216/2004 provides a specific, exhaustive scheme governing public access to and confidentiality of national registries. It creates a specific rule on confidentiality (Commission Regulation No 2216/2004) that overrode the general rule on confidentiality (the Environmental Information Directive), which is the legislation that would have otherwise governed public access to this information when held by public authorities in Member States.⁶⁹

With respect to public access and confidentiality, Commission Regulation No 2216/2004 states:

1. Each registry administrator shall make available the information listed in Annex XVI at the frequencies and to the recipients set out in Annex XVI in a transparent and organised manner via his registry web site. *Registry administrators shall not release additional information held in the registry.*
2. The Central Administrator shall make available the information listed in Annex XVI at the frequencies and to the recipients set out in Annex XVI in a transparent and organised manner via the Community independent transaction log web site. *The Central Administrator shall not release additional information held in the Community independent transaction log.*

For these reasons, the CJEU held that “the EU legislature did not intend to make requests concerning trading data such as that at issue in the main proceedings subject to the general provisions of [the Environmental Information Directive] but that, on the contrary, it sought to introduce, in respect of that data, a specific, exhaustive scheme for public reporting and confidentiality.”⁷⁰ Commission Regulation No 2216/2004 therefore created specific rules on confidentiality of national registries—i.e. “registry administrators shall not release additional information held in the registry” and “the central administrator shall not release additional information held in the Community independent transaction log”—because it was directed to create specific rules on confidentiality of national registries.⁷¹ *Ville de Lyon* underscores the importance of ensuring that, to the extent the legal frameworks under Regulation (EC) No 1049/2001 and Aarhus Regulation or the Environmental Information Directive are preferable, no provisions setting out or requiring adoption of a specific, exhaustive scheme on confidentiality should be adopted in other EU legislation on the subject matter.

II. ANALYSIS OF ACCESSIBILITY OF KEY INFORMATION RELATED TO VEHICLE TYPE-APPROVAL

Throughout the vehicle type-approval and surveillance process, environmental information of significant interest to the public is collected and held by or for EU institutions, public authorities of Member States or third parties. This section provides preliminary analyses of how different requests for environmental information would likely be treated, in light of the legal frameworks described above. It sets out to describe its status under existing and proposed relevant EU legislation – with an emphasis placed on the information’s status under the Proposed EU Type-Approval Regulation over the outgoing EC Type-Approval Directive. It should be noted that the analysis assumes the environmental information is generated in accordance with the “single-step type-approval” of vehicles—the most common procedure used by vehicle manufacturers in the EU.⁷²

In order to conduct these analyses, it is important first to review the status of the actors in the vehicle type-approval process, namely approval authorities, technical services and market surveillance authorities, to understand whether they are—or could be considered—public authorities as that term is defined in Article 2(2) of the Environmental Information Directive. If so, they would be subject to the same rules governing public access to environmental information held by or for Member States.

Approval Authorities

Article 3(12) of the Proposed EU Type-Approval Regulation defines “approval authority” as follows:⁷³

‘[A]pproval authority’ means the authority or authorities of a Member State, notified to the Commission by that Member State, with competence for all aspects of the type-approval of a vehicle ... for issuing and, if appropriate, withdrawing or refusing approval certificates, for acting as the contact point for the approval authorities of the other Member States, for designating the technical services, and for ensuring that the obligations regarding the conformity of production of the manufacturer are met.

An approval authority clearly meets the definition of a public authority under Article 2(2)(b) of the Environmental Information Directive, which states that “any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment” is a public authority.⁷⁴ As such, approval authorities are subject to the rules governing public access to environmental information of that Directive held by or for Member States.

With that said, the Proposed EU Type-Approval Regulation contains specific statements concerning the confidentiality required of approval authorities in carrying out their functions. For example, Article 71(5) of the Proposed EU Type-Approval Regulation further states that the “type-approval authority shall safeguard the confidentiality of the information it obtains.”⁷⁵

Article 7(2) of the Proposed EU Type-Approval Regulation further states:⁷⁶

Approval authorities ... shall observe confidentiality where necessary in order to protect commercial secrets, subject to the obligation of information laid down in Article 9(3) in order to protect the interests of users in the [EU].

Article 9(3) states that:⁷⁷

For the purpose of enabling the Commission to carry out the testing [necessary for compliance verification], Member States shall make available to the Commission all data related to the type-approval of the vehicle, systems, components and separate technical units subject to compliance verification testing. Those data shall include at least the information included in the type-approval certificate and its attachments referred to Article 26(1).

It is an open question whether this language would rise to the level of a specific rule on confidentiality that would govern a general one, but a strong argument could be made that such language does not create a “specific, exhaustive scheme” as in *Ville de Lyon* but rather simply requires observance of confidentiality of commercial secrets in the discharge of their duties.

Technical Services

Technical services are designated, assessed, monitored and authorized to conduct their activities on behalf of the Member States by approval authorities.⁷⁸ Indeed, in certain cases the Member State’s approval authority is permitted to perform the services normally provided by technical services.⁷⁹ Therefore, a technical service should meet the definition of a “public authority” under Article 2(2)(c) of the Environmental Information Directive which states that “any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within [Article 2(2)] (a) or (b)” is a public authority⁸⁰ because the approval authority that controls it falls within the definition of “public authority” under Article 2(2)(b). Technical services are responsible for demonstrating compliance with the technical requirements of the Proposed EU Type-Approval Regulation and other relevant EU legislation by means of appropriate tests.⁸¹ As such, technical services should be subject to the rules governing public access to environmental information held by or for Member States in the Environmental Information Directive.

Market Surveillance Authorities

Article 3(13) of the Proposed EU Type-Approval Regulation defines “market surveillance authority as follows:⁸²

‘[M]arket surveillance authority’ means the national authority or authorities responsible for carrying out market surveillance on the territory of the Member State.

A market surveillance authority would meet the definition of a public authority under Article 2(2)(b) of the Environmental Information Directive, and would therefore be subject to the rules governing public access to environmental information of that Directive held by or for Member States.

Among other things, market surveillance authorities are obliged to “perform regular checks to verify compliance of vehicles, systems, components and separate technical units with the requirements set out in this Regulation as well as with the correctness of the type-approvals. Those checks shall be performed on an adequate scale, by means of documentary checks and real-drive and laboratory tests on the basis of statistically relevant samples ... [and] shall require economic operators to make the documentation and information available as they consider necessary for the purpose of carrying out their activities.”⁸³

Article 8(6) of the Proposed EU Type-Approval Regulation states:⁸⁴

Market surveillance authorities ... observe confidentiality where necessary in order to protect commercial secrets, subject to the obligation of information laid down in Article 9(3) to the fullest extent necessary in order to protect the interests of users in the [EU].

It is an open question whether this language would rise to the level of a specific rule on confidentiality that would govern a general one, but a strong argument could be made that such language does not create a “specific, exhaustive scheme” as in *Ville de Lyon* but rather simply requires observance of confidentiality of commercial secrets in the discharge of their duties.

A. APPLICATIONS AND CERTIFICATES FOR TYPE-APPROVAL

The Proposed EU Type-Approval Regulation begins with the following principle:

In order to increase transparency in the approval process and facilitate the exchange of information and the independent verification by market surveillance authorities, approval

authorities and the Commission, type-approval documentation should be provided in electronic format and be made publicly available, subject to exemptions due to protection of commercial interests and the protection of personal data.⁸⁵

To effect this mandate, under the Proposed EU Type-Approval Regulation, the “manufacturer shall submit” its application and information package, *i.e.* the information folder and test reports, to the approval authority of a Member State.⁸⁶ The Member State must keep the information package for 10 years and make all data related to type-approval available to the Commission for purposes of compliance verification as well as make public data for compliance verification by third parties subject to the “protection of commercial interests.”⁸⁷ This includes information related to emissions, emission control systems and the OBD system as set forth in the Commission Regulation (EC) 692/2008.⁸⁸

The EC type-approval certificate and attachments, including the information package,⁸⁹ are also held by the approval authority as well as the approval authorities of other Member States and the Commission⁹⁰ as is any notice and reasons for refusal or withdrawal of vehicle type-approval.⁹¹

Similarly, any application for an amendment is submitted to the Member State’s type-approval authority that granted original approval while an amendment to an EC type-approval that has been granted must be communicated to the type-approval authorities of other Member States and the Commission (who can also request the accompanying test reports).⁹² An amendment to EC type-approval is also held by the approval and, under the Proposed EU Type-Approval Regulation, also held by the Commission.⁹³

The only specific laws governing disclosure of any of this information is the caveat that Member States make the data in the information package public for compliance by third parties subject to the “protection of commercial interests.” Although it is an open question whether this language would rise to the level of a specific rule on confidentiality that would govern a general one, it would appear that such language does not create a “specific, exhaustive scheme” as in *Ville de Lyon*.

As a result, to the extent this information is held by approval authorities of Member States, this environmental information should be made available to the public under the Environmental Information Directive limited only to the extent disclosure of the information would adversely affect the intellectual property rights of manufacturers. In addition, Article 4(2)(e)-(f) of the Environmental Information Directive requires public authorities of Member States to make certain information available on public databases, including:

- (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment; [and]
- (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found...

It could be argued that any environmental information contained in applications for type-approval, EC type-approval certificates and notices and reasons for refusal or withdrawal of vehicle type-approvals should be publicly available on electronic databases. Moreover, if such information has been communicated to the Commission by the approval authority of a Member State, *e.g.* an amendment to the EC type-approval, such information should be disclosed.⁹⁴

B. TEST REPORTS

Under the EC Type-Approval Directive, test reports of tests performed by the designated technical services are held by the technical service but are not a part of the information folder submitted to the approval authority as part of the type-approval application.⁹⁵ They are instead added to the “information package” held by the technical service.⁹⁶ In regards to emissions tests, technical services are only required to “inform the Commission of the circumstances of each type-approval granted” but not turn over the actual test

reports.⁹⁷ The guarding of this information may not, however, impede public access to this information as the technical services may be considered public authorities of Member States, as discussed above.

Nonetheless, Proposed EU Type-Approval Regulation makes changes that alter the secretive status previously accorded test reports.

First, Article 24(4) of the Proposed EU Type-Approval Regulation ensures that the information package assembled by approval authorities contains test reports previously exclusively held by technical services:

The approval authority shall put together an information package consisting of the information folder referred to in Article 22, *accompanied by the test reports* and all other documents that were added to the information folder by the technical service or by the approval authority while carrying out their tasks.

The information package shall contain an index indicating clearly all the pages and the format of each document and recording chronologically the management of the EU type-approval. The approval authority shall keep the information package available for a period of ten years after the end of validity of the EU type-approval concerned.

Second, Article 9(3)-(4) of the Proposed EU Type-Approval Regulation gives the Commission access to test reports in the “information package” held by approval authorities of Member States:

3. For the purpose of enabling the Commission to carry out the testing referred to in paragraphs 1 and 2, Member States shall make available to the Commission all data related to the type-approval of the vehicle, systems, components and separate technical units subject to compliance verification testing. Those data shall include at least the information included in the type-approval certificate and its attachments referred to Article 26(1)...
4. Vehicle manufacturers shall make public data which are needed for the purpose of compliance verification testing by third parties. The Commission shall adopt implementing acts in order to define the data to be made public and the conditions for such publication, subject to the protection of commercial secrets and the preservation of personal data pursuant to Union and national legislation. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

Article 26(1) of the Proposed EU Type-Approval Regulation goes one step further by including the information package, including test reports, among the attachments to the EU type-approval certificate.⁹⁸ This language would clearly rise to the level of a specific rule on confidentiality that would govern a general one as it appears to create a “specific, exhaustive scheme” as in *Ville de Lyon*, although the specific, exhaustive scheme will be subject to further elaboration by the Commission in implementing acts. What is known, however, this information, by explicit reference, is subject to the protection of commercial secrets and the preservation of personal data pursuant to EU and national legislation.

C. NO_x AFTER TREATMENT DEVICES

Under Article 3(9) of Commission Regulation (EC) 692/2008, information relating to NO_x after treatment devices must be disclosed and presented to the type-approval authority and can later be requested by the Commission.⁹⁹ The Proposed EU Type-Approval Regulation makes no specific references to the availability of this information, and given its relationship to emissions into the environment, would appear accessible under Regulation (EC) No 1049/2001 and Aarhus Regulation.

D. DISCLOSURE OF BES AND AES

The disclosure of any base emissions strategy (BES) and auxiliary emission strategy (AES) mandated under the post-VW scandal legislation, Commission Regulation (EU) 2016/646, is one of the few areas where it appears a specific piece of relevant EU legislation would override Regulation (EC) No 1049/2001, the Aarhus Regulation and the Environmental Information Directive. The recent amendment to Commission Regulation (EC) 692/2008 requires that manufacturers' disclose their BESs and AESs to the approval authority, but only as part of an "extended document package," which is without reference in the rest of the relevant EU legislation.¹⁰⁰ The amendment then goes on to state:¹⁰¹

The extended documentation package referred to in paragraph 11 *shall remain strictly confidential*. It may be kept by the approval authority, or, at the discretion of the approval authority, may be retained by the manufacturer. In the case the manufacturer retains the documentation package, that package shall be identified and dated by the approval authority once reviewed and approved. It shall be made available for inspection by the approval authority at the time of approval or at any time during the validity of the approval.'

It is likely this language would rise to the level of a specific rule on confidentiality — strict confidentiality — that would govern a general one as it appears to create a "specific, exhaustive scheme" as in *Ville de Lyon*. To the extent held by the approval authority, which is not always the case, if this language is adopted it would significantly hinder access under the current legal framework.

E. SOFTWARE AND ALGORITHMS

Under Article 23(4) of the Proposed EU Type-Approval Regulation, "[t]he approval authority and technical services shall have access to the software and algorithms of the vehicle."¹⁰²

Although it is an open question whether this language would rise to the level of a specific rule on confidentiality that would govern a general one, it would appear that such language does not create a "specific, exhaustive scheme" as in *Ville de Lyon* and thus would be accessible to the extent permissible under the Environmental Information Directive.

F. MARKET SURVEILLANCE AND COMPLIANCE VERIFICATION

Under the Proposed EU Type-Approval Regulation, the Commission must carry out "adequate testing and inspections of vehicles, systems, components and separate technical units already made available on the market."¹⁰³ "The Commission shall publish a report of its findings following any compliance verification testing it has carried out."¹⁰⁴

Member States must also "periodically review and assess the functioning of their type-approval activities. Such reviews and assessments shall be carried out at least every four years and the results thereof shall be communicated to the other Member States and the Commission. The Member State concerned shall make a summary of the results accessible to the public, in particular the number of type-approval granted and the identity of the corresponding manufacturers."¹⁰⁵

Every 30 months, type-approval authorities must assess whether their technical services are satisfying the requirements of the Proposed EU Type-Approval Regulation and "shall report to the Commission and to the other Member States on those monitoring activities. The reports shall contain a summary of the assessment which shall be made publicly available."¹⁰⁶

Further, an assessment of the functioning of market surveillance authorities is performed by Member States every four years and communicated to other Member States and Commission with a summary accessible to public.¹⁰⁷

It is likely this language would rise to the level of a specific rule on confidentiality that would govern a general one, as it appears to create a "specific, exhaustive scheme" as in *Ville de Lyon*.

G. MEASURES RELATED TO NON-COMPLIANCE WITH EC TYPE-APPROVAL CERTIFICATES

Under the EC Type-Approval Directive, when a type-approval authority of a Member State becomes aware of a vehicle that is not in compliance with its EC type-approval certificate for failure of conformity to the approved type it is obligated to send notification to other Member States and also to list all proposed recall measures.¹⁰⁸

Under Article 50 of the Proposed EU Type-Approval Regulation, this notification process is more detailed and must include notifying the Commission, including:

[A] ll available details, in particular the data necessary for the identification of the non-compliant vehicle, system, component or separate technical unit, its origin, the nature of the non-conformity alleged and the risk involved, the nature and duration of the national restrictive measures taken, and the arguments put forward by the relevant economic operator.¹⁰⁹

Other Member States and the Commission are then afforded an opportunity to assess and, where they feel it is appropriate, challenge the restrictive measures imposed by the Member State where the EC type-approval was granted.¹¹⁰

Given its relationship to inspections, which is an exception to disclosure under the third indent of Article 4(2) of Regulation (EC) No 1049/2001, this information may be withheld unless there is an overriding public information in disclosure,¹¹¹

However, like the EC Type-Approval Directive and other relevant EU legislation, the Proposed EU Type-Approval Regulation requires Member States to establish penalties for non-compliance and notify the Commission of their penalty regime.¹¹² The Proposed EU Type-Approval Regulation buttresses this requirement by also requiring Member States “report to the Commission every year on the penalties they have imposed.”¹¹³ This information, if related to court proceedings and investigations, which are exceptions to disclosure under the second and third indents of Regulation (EC) No 1049/2001, respectively, may be withheld unless there is an overriding public interest in disclosure. To the extent it is not related to court proceedings, it should be made publicly available.¹¹⁴

GENERAL LEGAL FRAMEWORK ON ACCESS TO INFORMATION IN THE UNITED STATES

In the U.S., vehicle certification and compliance is governed by the CAA and regulations promulgated and administered by EPA and contained in 40 C.F.R. Part 86. Information relating to vehicle certification and compliance with emissions standards contained in EPA's records can be obtained in one of two ways. First, there is information that EPA makes publicly available. Second, there is information held in EPA records that members of the public can access via a request under FOIA.

I. PUBLICLY AVAILABLE VEHICLE CERTIFICATION AND COMPLIANCE INFORMATION

As a matter of practice, EPA makes certain types of records related to the statutes it administers available to the public on the internet. These records include:

- (1) final opinions and orders made in adjudicating cases;
- (2) final statements of policy and interpretations which have not been published in the Federal Register;
- (3) administrative staff manuals and instructions to staff that affect members of the public; and
- (4) copies of records that have been the subject of a FOIA request and are of sufficient public interest that the agency believes other persons are likely to request them.¹¹⁵

To the extent that information relating to vehicle certification falls into one of these categories, this information is already publicly available on the internet. In addition, EPA makes certificates for every certified engine family available on their website, which includes information on certified vehicles and testing conducted in support.¹¹⁶ Thus, in comparison to the EU, the U.S. provides a wealth of information to the public even in the absence of a document request.

II. INFORMATION POTENTIALLY AVAILABLE UNDER THE FREEDOM OF INFORMATION ACT

FOIA establishes the general principle that any person has the right to request access to federal agency records.¹¹⁷ In general, following a FOIA request, the administrative agency, in this case EPA, must make records in its possession that are responsive to the request available to the requestor unless the information is subject to any one of FOIA's nine categories of exemptions or three exclusions.¹¹⁸

Pursuant to the CAA, EPA has promulgated regulations in 40 CFR §86.1844-01(d)(11) requiring automobile manufacturers disclose to EPA information relating to any auxiliary emissions control device (AECD) employed by their vehicles before a certificate of conformity will be issued. In the U.S., all defeat devices are, by definition, AECDs and are therefore subject to the same disclosure requirements.¹¹⁹ 40 CFR §86.1844-01(d)(11) reads as follows:

§ 86.1844-01 Information requirements: Application for certification and submittal of information upon request.

...

(d) *Part 1 Application*. Part 1 must contain the following items: ...

(11) A list of all auxiliary emission control devices (AECD) installed on any applicable vehicles, including a justification for each AECD, the parameters they sense and control, a detailed justification of each AECD which results in a reduction in effectiveness of the emission control system, and rationale for why the AECD is not a defeat device as defined under §§ 86.1809-01 and 86.1809-10. For any AECD uniquely used at high altitudes, EPA may request engineering emission data to quantify any emission impact and validity of the AECD. For any AECD uniquely used on multi-fuel vehicles when operated on fuels other than gasoline, EPA may request engineering emission data to quantify any AECD.

In addition, Part 2 of the application for certification must be submitted to EPA by automobile manufacturers by January 1st of the applicable model year and include, *inter alia*, the following information in 40 CFR §86.1844-01(e):

(e) ... (2) Basic calibration information, organized by engine code (or other similar classification scheme), for the major components of the fuel system, EGR system, ignition system, oxygen sensor(s) and thermostat. Examples of major components and associated calibration information include, but are not limited to; fuel pump and fuel pump flow rate, fuel pressure regulator and regulated fuel pressure, EGR valve and EGR exhaust gas flow rate at specified vacuum levels, EGR vacuum regulator and regulated vacuum, EGR orifice and orifice diameter, basic engine timing, timing RPM, idle rpm, spark plug gap, oxygen sensor output (mV), and thermostat opening temperature.

Thus, for every certified vehicle type, EPA should have in its records the information related to AECDs listed above. In addition to this information, EPA has the authority to require automobile manufacturers disclose additional information related to an AECD it believes is a defeat device or potential defeat device. For example, under 40 CFR 86.1844-01(g):

(g) The manufacturer shall provide the following information, or other information as deemed necessary by the Administrator ...

(3) Detailed technical descriptions of emission-related components and AECDs, including schematic diagrams and hose and wire routings which describe the fundamental operating characteristics of each emission control system.

(4) Detailed calibration specifications for all emission-related components and AECDs.

(5) Any information necessary to demonstrate that no defeat devices are present on any vehicles covered by a certificate including, but not limited to, a description of the technology employed to control CO emissions at intermediate temperatures, as applicable.

(6) The following information describing any adjustable parameters:

(i) A list of those parameters which are physically capable of being adjusted (including those adjustable parameters for which access is difficult) and that, if adjusted to settings other than the manufacturer's recommended setting, may affect emissions; ...

(8) A record of all emission tests performed on all durability and emission data vehicles required to be tested by this subpart including test results, the date and purpose of each test, and the number of miles accumulated on the vehicle. ...

In addition to information specifically related to AECDs and defeat devices, EPA also has in its records other emissions-related information, including emissions test results, obtained under other provisions of the CAA.¹²⁰ All of this information in EPA's records is obtainable via a FOIA request unless it is subject to an exemption or exclusion.

III. FREEDOM OF INFORMATION ACT EXEMPTIONS

FOIA provides nine exemptions and three exclusions to the general principle that any person has the right to request access to federal agency records.¹²¹ The nine exemptions are set forth in 5 U.S.C. §552(b) which states that FOIA does not apply to matters that can be broadly characterized as:

- (1) information that is classified to protect national security;
- (2) information related solely to the internal personnel rules and practices of an agency;
- (3) information that is specifically exempted from disclosure by another federal statute (other than FOIA);
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) privileged communications within or between agencies including, deliberative privilege, attorney-work product privilege and attorney-client privilege;
- (6) information that, if disclosed, would violate another individual's personal privacy;
- (7) information compiled for law enforcement purposes where, among other things, disclosure could interfere with enforcement proceedings;
- (8) information that concerns supervision of financial institutions; or
- (9) geological information concerning wells.¹²²

The three exclusions are applied to three narrow categories of information related to law enforcement or national security records where: (1) non-disclosure protects the existence of an ongoing criminal law enforcement investigation when the subject of the investigation is unaware that it is pending; (2) non-disclosure protects the existence of informant records when the informant's status has not been officially confirmed; or (3) non-disclosure protects a foreign or other intelligence source.¹²³

Of these exemptions and exclusions, in the absence of an ongoing criminal or civil investigation that could invoke exemptions 5 and 7 or exclusion 1, the most likely exemptions that could be relied upon to support the non-disclosure of agency records related to vehicle certification and compliance, and in particular AECDs, defeat devices and other emissions-related information, are exemptions 3 and 4. These exemptions are therefore addressed in greater detail below.

A. EXEMPTION 3 - SPECIFICALLY EXEMPTED INFORMATION

The first possible exemption, exemption 3, exempts from disclosure information:

“specifically exempted from disclosure by statute (other than [FOIA]) if that statute— ...
(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]”¹²⁴

For information related to emissions from motor vehicles, neither the CAA nor any other federal statute specifically exempts any category of emissions-related information in EPA's records obtained during vehicle certification and compliance. Rather, the CAA reaffirms the general principle of public availability of information related to AECDs, defeat devices and other emissions-related information while carving out a limited exemption for non-emissions data that is also a trade secret. CAA §7542(c) establishes the general principle that all information obtained by EPA under Part A – Motor Vehicle Emissions and Fuel Standards – shall be available to the public with one exception:

Any records, reports, or information obtained under this part [of the CAA] shall be available to the public, *except* that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or a particular portion thereof (other than emission data), to which the Administrator has access under this section, *if made public, would divulge methods or processes entitled to protection as trade secrets of that person, the Administrator shall consider the record, report, or information or particular portion thereof confidential ...*

EPA's authority to obtain information related to AECDs, defeat devices and most other emissions-related information is derived from CAA Part A which concerns motor vehicle emissions and fuel standards and to which CAA §7542(c) is applicable. As a result, under the CAA, information obtained by EPA that meets the definition of “emissions data”—including information on AECDs and defeat devices which by definition impact emissions¹²⁵—must be made available to the public. Further, under the federal district court case *Gersh & Danielson v. EPA* and similar cases, because all other exemptions and exclusions under FOIA would directly conflict with these disclosure requirements for information obtained under CAA Part A (but not the same information if obtained some other way), the FOIA exemptions, but not exclusions, are inapplicable.¹²⁶ Information that can be categorized as non-emissions data trade secrets is the only information obtained under Part A of the CAA where a federal statute other than FOIA “establishes particular criteria for withholding or refers to particular types of matters to be withheld” from disclosure.¹²⁷ All other information obtained under Part A of the CAA that is characterized as non-emissions data must also be made public unless “if made public, would divulge methods or processes entitled to protection as trade secrets.” Trade secrets are the subject of exemption 4, discussed in the next section.

CAA §7542(c) is explicit that the exception to the rule of public availability for trade secrets does not apply to “emissions data”. That is, the CAA identifies one situation where otherwise exempt trade secret information must still be made available to the public and that is when the information is characterized as

“emissions data”. EPA has promulgated regulations defining “emissions data” in 40 CFR §2.301(a)(2) as follows:

§2.301 Special rules governing certain information obtained under the Clean Air Act.

(a) Definitions. For the purpose of this section:...

(2)(i) Emission data means, with reference to any source of emission of any substance into the air—

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source). ...

As a result of this broad definition, the vast majority of the information EPA receives concerning AECDs and/or defeat devices would appear to meet the definition of “emissions data” promulgated by EPA and therefore the CAA requires this information be made public notwithstanding the exemption related to “trade secrets” in CAA §7542(c) and other exemptions in FOIA.

This reading of these provisions is consistent with other provisions concerning the public availability of emissions data within the CAA. Specifically, CAA §7525 requires EPA make available to the public the test results of:

[A]ny emission control system incorporated into a motor vehicle submitted to [EPA] by any person, in order to determine whether such system enables such vehicle or engine to conform to the standards required to be prescribed under section 7521(b) of [the CAA].¹²⁸

CAA §7521 sets forth, or empowers EPA to establish, emissions standards for new motor vehicles. CAA §7521(b) specifically concerns emissions of carbon monoxide, hydrocarbons and *oxides of nitrogen*.¹²⁹ As a result, tests submitted by automobile manufacturers or testing authorities to EPA to demonstrate compliance with NO_x emissions standards and many other pollutant emission standards are publicly available upon request. This would include testing under 40 CFR §86.1809-1 “for the purposes of investigating a potential defeat device.”¹³⁰

The existence within the CAA of an explicit disclosure requirement for information obtained under CAA Part A with a limited exception for non-emissions data trade secrets, means the only remaining exemption relevant to a request for information related to vehicle certification under the CAA would be exemption 4, which protects information characterized as “trade secrets and commercial information obtained from a person and privileged or confidential”.¹³¹ The below analysis of whether and to what extent information required to be submitted to EPA concerning AECDs and defeat devices meets the definition of a trade secret is only relevant to the explicit requirement that EPA make this information publicly available in the event that it is found to be non-emissions data.

B. EXEMPTION 4 - TRADE SECRETS AND COMMERCIAL OR FINANCIAL INFORMATION

As discussed above, the CAA limits the applicability of FOIA exemptions to information EPA obtains under authority derived from Part A of the CAA concerning motor vehicle emissions and fuel standards to non-emissions data that can be characterized as “trade secrets”. Within the exemption category of “trade secrets and commercial or financial information” the amount and types of information that are characterized as “commercial or financial information” are significantly larger than the limited amount and types of information characterized as “trade secrets”.¹³² Trade secrets represent a comparatively limited category of information.

The FOIA exemption for “trade secrets and commercial information that is confidential or privileged” is interpreted and applied by EPA through 40 C.F.R §§2.201-2.311. Under these regulations, business information is defined broadly to include “any information which pertains to the interests of any business, which was developed or acquired by that business ...”¹³³ EPA considers trade secrets to be a subcategory of business information and includes trade secrecy among the “reasons for business confidentiality” and specifically includes FOIA exemption 4 within that category:

[T]he concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from rights in the information. The definition is meant to encompass any concept which authorizes a Federal agency to withhold information from the public for the benefit of a business under 19 U.S.C. 552(b)(4) ... or any of the other various statutes cited in §§2.301 through 2.309.¹³⁴

Under 40 CFR §2.208, Business information, including trade secrets, is only entitled to confidential treatment where:

- (a) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;
- (b) The business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;
- (c) The information is not, and has not been, reasonably obtainable without the business's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);
- (d) *No statute specifically requires disclosure of the information;* and
- (e) Either—
 - (1) *The business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position;* or
 - (2) The information is voluntarily submitted information (see §2.201(i)), and its disclosure would be likely to impair the Government's ability to obtain necessary information in the future.¹³⁵

As discussed above, CAA §7542(c) specifically requires disclosure of information that is “emissions data” thereby removing much of the information concerning AECDs and defeat devices from the business information/trade secrets exemption because it violates the requirement in 40 CFR §2.208(d) that “no statute specifically requires the disclosure of the information.” However, for all other information that cannot be characterized as emissions data, the exemption for trade secrets still applies to qualifying information.

All other non-emissions data related to AECDs and defeat devices that may be exempt from a FOIA request under 40 CFR §2.208 must still satisfy, *inter alia*, requirement (e)(1) that “the business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business’s competitive position.”¹³⁶ EPA’s requirement that the competitive harm be “substantial” is a departure from the traditional

common law threshold definition of “trade secret” that encompassed virtually any information that provides a competitive advantage.

Similarly, courts ruling in specific FOIA exemption cases have also departed from the traditional expansive definition of “trade secret” and taken a more narrow view, albeit for other reasons. The leading case from the D.C. Circuit Court of Appeals defines “trade secret” as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”¹³⁷ Following this definition, courts have recognized trade secret protection for “product manufacturing and design information” but not for “general information concerning a product's physical or performance characteristics or a product formula when release would not reveal the actual formula itself.”¹³⁸

While the above summary provides the broad contours of “trade secret” FOIA law, whether and how specific information related to AECDs or defeats devices that is not “emissions data” as defined by EPA meets EPA’s requirement of substantial harm or the common law definition of “trade secrets” making it exempt from FOIA disclosure can only be resolved on a case-by-case basis.

Finally, to the extent that some portion of requested records contains information that is considered “non-emissions data” and also a “trade secret” and therefore treated as confidential by EPA and exempt from disclosure under CAA §7542(c), EPA must nonetheless make the remaining portion of the records available to the requestor following a redaction of this confidential portion.

IV. FREEDOM OF INFORMATION ACT REQUEST PROCEDURE

The process for filing a FOIA request and the timeline for EPA (or any other federal agency) to respond to that request is set forth in FOIA §552(a)(6)(A). Once a FOIA request is received by EPA, the agency has 20 working days to respond.¹³⁹ This response, called a “determination letter”, will make the records available to the requestor and/or will advise the requestor of any information that is being withheld pursuant to one of the exemptions or exclusions. If any responsive record is deemed exempt, “any reasonably segregable portion of the record shall be provided ... after deletion of the portions which are exempt.”¹⁴⁰ If records responsive to the request are withheld or the requestor believes that there are additional responsive records beyond those processed by the EPA, the requestor may file an administrative appeal with the National FOIA Officer within 30 days from the date of the denial letter. If EPA fails to respond within the time limit or to the appeal or the requestor does not agree with the determination of the National FOIA officer, the requestor may file a lawsuit in federal district court.¹⁴¹

COMPARISON OF THE LEGAL FRAMEWORKS FOR ACCESS TO INFORMATION IN THE EU AND US

When comparing the legal frameworks for access to information related to vehicle emissions, and specifically defeat devices or potential defeat devices, the U.S. system is more transparent, i.e. more key information is readily available to the public. The three primary reasons for arriving at this conclusion are: (1) the centralized manner of data collection at EPA; (2) the explicit requirement that all emissions data obtained under Part A of the CAA during vehicle certification and compliance monitoring be publicly available; and (3) the lack of any specific provisions requiring confidentiality of information related to defeat devices or potential defeat devices similar to that found in the EU.

First, even under the Proposed EU Type-approval Regulation, a significant amount of key information will still be held by Member States and not EU institutions. To the extent that certain vehicle type-approval information is held by Member States, it is more difficult to obtain for at least three reasons. First, identifying which Member State possesses the desired information adds an unnecessary layer of complexity. While much of this information will be available on registries, once the Member State is identified, further identifying the public authority holding that information presents linguistic and bureaucratic challenges. Similarly, legal processes for asserting one's public right to information once the uniform procedures have been exhausted will differ from Member State to Member State. Finally, to the extent the desired information can be characterized as "intellectual property rights" as opposed to "commercial or industrial information" it is outside the overriding public interest created by the emissions clause of the Environmental Information Directive. While the degree to which the intellectual property right exception to the emissions clause has yet to be determined, it presents a potential limiting factor to the availability of emissions-related information.

Second, from the perspective of certification and compliance monitoring, EPA receives all of the key information it needs under Part A of the CAA. The explicit requirement that all of this information, to the extent it is "emissions data" as that term is expansively interpreted by EPA, be made publicly available greatly increase the overall transparency of the regulatory framework. This is buttressed by the limitation placed on all other information obtained under Part A of the CAA that only the FOIA exemption for trade secrets applies. While the Proposed EU Type-approval Regulation has certain areas where it creates a specific, exhaustive scheme on confidentiality that provides for more disclosure of emissions-related information than would be available under the general legal framework, it is in no way as significant in breadth and scope as the CAA. More importantly, in the one area where public disclosure is most critical—information related to defeat devices or potential defeat devices—the Proposed EU Type-approval Regulation does nothing to undo the harm caused by other relevant EU legislation.

Third, the explicit requirement in Commission Regulation (EU) 2016/646 that information disclosed to approval authorities related to Base Emission Strategies (BESs) and Auxiliary Emission Strategies (AESs) "remain strictly confidential" potentially undermines the entire scheme for monitoring and enforcing emissions standards in the EU and represents a potential weakness in the regulation.

For more information, contact:

Tim Grabiell
Senior Lawyer
Défense Terre
e: tgrabiell@defenseterre.org
t: +33 6 32 76 77 04

Pete Grabiell
Senior Lawyer
Défense Terre
e: petergrabiell@gmail.com
t: +1 (503) 388-1807

- ¹ 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 (“Regulation (EC) No 1049/2001”).
- ² 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 (“Aarhus Regulation”).
- ³ 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 (“Environmental Information Directive”).
- ⁴ Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (“EC Type-Approval Directive”).
- ⁵ Proposal for a Regulation of the European Parliament and of the Council on the Approval and Market Surveillance of Motor Vehicles and their Trailers, and of Systems, Components and Separate Technical Units Intended for Such Vehicles (27 January 2016), COM(2016) 31 final (“Proposed EU Type-Approval Regulation”).
- ⁶ *Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information* (“Regulation (EC) 715/2007”).
- ⁷ Commission Regulation (EC) 692/2008 of 18 July 2008 implementing and amending Regulation (EC) 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (“Commission Regulation (EC) 692/2008”). Although not included in the latest consolidated version of Commission Regulation (EC) 692/2008, a recent amendment to Commission Regulation (EC) 692/2008 contained in *Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 715/2007 as regards emissions from light passenger and commercial vehicles (Euro 6)* (“Commission Regulation (EU) 2016/646”) includes new provisions in Commission Regulation (EC) 692/2008 that will require the disclosure of the existence of all potential defeat devices during the vehicle type-approval process. These amendments will be discussed in this briefing in due course. See Commission Regulation (EU) 2016/646, Article 1(1).
- ⁸ Freedom of information Act, 5 U.S.C. §552, *Public information; agency rules, opinions, orders, records, and proceedings* (hereinafter “FOIA”).
- ⁹ Regulation (EC) 1049/2001, Art. 2(3), 3(a) (including documents that are either written on paper or stored in electronic form).
- ¹⁰ Regulation (EC) 1049/2001, Recital 11.
- ¹¹ Case C-506/08 P *Kingdom of Sweden v MyTravel Group and Commission* (2011), paragraph 75 citing Case C-266/05 P *Sison v Council* (2007), paragraph 63; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* (2008), paragraph 36; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* (2010), paragraph 73.
- ¹² Regulation (EC) No 1049/2001, Article 4(2).
- ¹³ Case T-380/04 *Terezakis v. Commission* [2008] ECR II-11, para 93.
- ¹⁴ Regulation (EC) No 1049/2001, Article 4(4).
- ¹⁵ Regulation (EC) No 1049/2001, Article 4(6).
- ¹⁶ Regulation (EC) No 1049/2001, Article 4(5).
- ¹⁷ Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, para. 86.
- ¹⁸ Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, para. 87.
- ¹⁹ Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, para. 88.
- ²⁰ Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, paras. 89-90.
- ²¹ Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, paras. 89-90.
- ²² Regulation (EC) No 1049/2001, Article 11(1)-(2).
- ²³ Regulation (EC) No 1049/2001, Article 6 – 8.
- ²⁴ Aarhus Regulation, Art. 1(a).
- ²⁵ Aarhus Regulation, Art. 2(d).
- ²⁶ Aarhus Regulation, Art. 4(2)(c)-(f).
- ²⁷ Aarhus Regulation, Recital 12, Arts. 2(c) and 3 (changing « the word ‘institution’ in Regulation (EC) No 1049/2001 [to] read as ‘Community institution or body’ which is defined in Article 2(c) of the Regulation). This is consistent with the “[t]he Aarhus Convention [which] defines public authorities in a broad way, the basic concept being that wherever public authority is exercised, there should be rights for individuals and their organisations. It is therefore necessary that the Community institutions and bodies covered by this Regulation be defined in the same broad and functional way.” Aarhus Regulation, Recital 7.

²⁸ Article 4(e) – (f) of the Aarhus Regulation also adds the following information to the publicly available registries established under Regulation (EC) No 1049/2001: “(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment” and “(f) authorisations with a significant impact on the environment ... or a reference to the place where such information can be accessed.” See Aarhus Regulation, Art. 4(e)-(f).

²⁹ Aarhus Regulation, Recital 15.

³⁰ Aarhus Regulation, Recital 15.

³¹ Aarhus Regulation, Art. 6(1).

³² Case C-673/13 P, *Commission v. Sweden* (2016); see also Case C-442/14, *Bayer CropScience SA-NV and Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden* (request for a preliminary ruling), Ruling 2.

³³ Case C-673/13 P, *Commission v. Sweden* (2016), para. 79.

³⁴ Case C-673/13 P, *Commission v. Sweden* (2016), para. 80.

³⁵ Case C-673/13 P, *Commission v. Sweden* (2016), paras. 81-82.

³⁶ Regulation (EC) No 1049/2001, Art. 6(1).

³⁷ Regulation (EC) No 1049/2001, Art. 7(1).

³⁸ Regulation (EC) No 1049/2001, Art. 7(2). Failure by the EU institution to reply within the prescribed time-limit shall also entitle the applicant to make a confirmatory application. See Regulation (EC) No 1049/2001, Art. 7(4).

³⁹ Regulation (EC) No 1049/2001, Art. 8(1). But see Regulation (EC) No 1049/2001, Art. 8(2) (“In exceptional cases, for example in the event of an application relating to a very long document or 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.”).

⁴⁰ Regulation (EC) No 1049/2001, Art. 8(1). Failure by the EU institution to reply within the prescribed time-limit shall also entitle the applicant to institute court proceedings under the EC Treaty. See Regulation (EC) No 1049/2001, Art. 8(3).

⁴¹ See Aarhus Regulation, Art. 7.

⁴² Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraphs 69-74; see also Case T-188/98 *Kuijjer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

⁴³ Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraphs 69-74; see also Case T-188/98 *Kuijjer v. Council of the European Union* (2000), paragraph 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

⁴⁴ See Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), para 70.

⁴⁵ 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.

⁴⁶ See Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraph 73; see also Regulation (EC) No 1049/2001, Article 4(6), Article 4(7), and Article 11(1).

⁴⁷ See, e.g., Case T-2/03, *Verein für Konsumenteninformation v. Commission of the European Communities* (2005), paragraphs 69-74; Case T-188/98 *Kuijjer v. Council of the European Union* (2000), para 38; Case T-14/98, *Hautala v. Council of the European Communities* (1999), paragraph 67.

⁴⁸ Environment Information Directive, Art. 1(a).

⁴⁹ Environment Information Directive, Recital 16.

⁵⁰ Compare Environment Information Directive, Art. 2(1) with Aarhus Regulation, Art. 2(d).

⁵¹ Environment Information Directive, Art. 2(2). The Environmental Information Directive provides further definitions to supplement its definition of public authority. For example: “‘Information held by a public authority’ shall mean environmental information in its possession which has been produced or received by that authority” and “‘Information held for a public authority’ shall mean environmental information which is physically held by a natural or legal person on behalf of a public authority.” Environment Information Directive, Art. 2(3)-(4).

⁵² Article 4(1) contains procedural exceptions, e.g. for requests that are not held by the public authority to which the request is addressed, manifestly unreasonable, too general, requests incomplete material or unfinished documents or internal communications. See Environment Information Directive, Art. 4(1).

⁵³ Environment Information Directive, Art. 4(2)(d)-(e).

⁵⁴ Environment Information Directive, Art. 4(2).

⁵⁵ Environment Information Directive, Art. 4(2).

⁵⁶ See Opinion of the Advocate General Kokott, Case C 673/13 P *European Commission v Stichting Greenpeace Nederland and Pesticide Action Network Europe* (7 April 2016).

⁵⁷ Case C-442/14, *Bayer CropScience SA-NV and Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden* (request for a preliminary ruling), Ruling 2; see also Case C-673/13 P, *Commission v. Sweden* (2016).

⁵⁸ See e.g. Case T-245/11, *ClientEarth and The International Chemical Secretariat v European Chemicals Agency (ECHA)* [ECLI:EU:T:2015:675], para. 1.

⁵⁹ See Regulation (EC) No 1049/2001, Art. 4(2) and Aarhus Regulation, Art. 6(1).

⁶⁰ Environment Information Directive, Art. 4(4).

⁶¹ Environmental Information Directive, Recital 15.

⁶² Environmental Information Directive, Art. 3(1).

⁶³ Environmental Information Directive, Recital 17.

⁶⁴ If the public authority does not hold the information it shall notify the applicant of the public authority it believes does hold such information. See Environmental Information Directive, Art. 4(1)(a).

⁶⁵ See Environmental Information Directive, Art. 4(2)(a). Alternatively, within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (a) cannot be complied with. In such cases, the applicant shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it. See Environmental Information Directive, Art. 4(2)(a)(b). Alternatively, the public authority can ask that an applicant provide specificity to an overly general request within one month of receipt of the request. See Environmental Information Directive, Art. 4(3).

⁶⁶ See Environmental Information Directive, Art. 4(5). Again, where the volume or complexity of the requests requires it, the public authority may take two months before issuing its refusal so long as it notifies the applicant within the one month period. See Environmental Information Directive, Art. 3(2)(a)-(b).

⁶⁷ Case C-524/09 *Ville de Lyon v Caisse des Dépôts* [ECR 2010 I-14115], paragraph 39 ; see also Directive 2003/4/EC, Article 19 (“[i]n order to implement this Directive, the Commission shall adopt a Regulation in accordance with the procedure referred to in Article 23(2) for a standardised and secured system of registries in the form of standardised electronic databases containing common data elements to track the issue, holding, transfer and cancellation of allowances, to provide for public access and confidentiality as appropriate and to ensure that there are no transfers incompatible with obligations resulting from the Kyoto Protocol”).

⁶⁸ Directive 2003/87/EC, Article 19(3) (emphasis added).

⁶⁹ Case C-524/09 *Ville de Lyon v Caisse des Dépôts* [ECR 2010 I-14115], paras 34-41.

⁷⁰ Case C-524/09 *Ville de Lyon v Caisse des Dépôts* [ECR 2010 I-14115], para 40.

⁷¹ Commission Regulation No 2216/2004, Article 19(3).

⁷² For the purposes of this briefing, only the application for a “single-step type-approval” is considered. The application in a “single-step type-approval shall consist of the information folder, containing the relevant information required under Annex I, in relation to the regulatory acts specified in Annex IV or XI and, where applicable, in Part II of Annex III.” See EC Type-Approval Directive, Art. 6(3). The “‘information folder’ means the complete folder, including the information document, file, drawings, photographs and so on, supplied by the applicant ...” See EC Type-Approval Directive, Art. 3(38). This excludes the “test reports and all other documents added by the technical service or by the approval authority to the information folder in the course of carrying out their functions ...” That information is included in the “information package.” See EC Type-Approval Directive, Art. 3(39). The approval authority is required, however, to “compile or verify the index of the information package.” See EC Type-Approval Directive, Art. 9(3)(b).

⁷³ Proposed EU Type-Approval Regulation, Art. 3(12).

⁷⁴ Environmental Information Directive, Art. 2(2)(b).

⁷⁵ Proposed EU Type-Approval Regulation, Art. 71(5).

⁷⁶ Proposed EU Type-Approval Regulation, Art. 7(2).

⁷⁷ Proposed EU Type-Approval Regulation, Art. 9(3).

⁷⁸ Proposed EU Type-Approval Regulation, Art. 3(12), 71-86.

⁷⁹ Proposed EU Type-Approval Regulation, Art. 72(2).

⁸⁰ Environmental Information Directive, Arts. 2(2).

⁸¹ Proposed EU Type-Approval Regulation, Art. 28(1).

⁸² Proposed EU Type-Approval Regulation, Art. 13(3).

⁸³ Proposed EU Type-Approval Regulation, Art. 8(1)-(2).

⁸⁴ Proposed EU Type-Approval Regulation, Art. 8(6).

⁸⁵ See Proposed EU Type-Approval Regulation, Recital ¶122.

⁸⁶ See Proposed EU Type-Approval Regulation, Art. 21(1).

⁸⁷ See Proposed EU Type-Approval Regulation, Arts. 9(3)-(4), 24(1) and 26(1).

⁸⁸ Commission Regulation (EC) 692/2008, Art. 5.

⁸⁹ Includes “attachments.” See EC Type-Approval Directive, Art. 8(5).

⁹⁰ See Proposed EU Type-Approval Regulation, Art. 25(1)-(2). This is the same as under the existing EC Type-Approval Directive. See EC Type-Approval Directive, Art. 8(5).

⁹¹ See Proposed EU Type-Approval Regulation, Art. 25(3)-(4).

⁹² See EC Type-Approval Directive, Art. 13(2); Proposed EU Type-Approval Regulation, Arts. 31(1) and 25(1)-(2).

⁹³ See EC Type-Approval Directive, Art. 32(2); Proposed EU Type-Approval Regulation, Art. 25(1)-(2).

⁹⁴ Regulation (EC) No 1049/2001, Article 4(5).

⁹⁵ See EC Type-Approval Directive, Art. 3(39).

⁹⁶ For “single-step type-approval” of vehicles it is not stated that these tests are in the possession of the approval authority. In the case of “step-by-step type-approval” the “approval authority shall have access to the related information package until such time as the approval is issued or refused.” EC Type-Approval Directive, Art. 6(2).

⁹⁷ Commission Regulation (EC) 692/2008, Art. 3(2).

⁹⁸ See Proposed EU Type-Approval Regulation, Art. 26(1).

⁹⁹ Commission Regulation (EC) 692/2008, Art. 3(9).

¹⁰⁰ Commission Regulation (EU) 2016/646, Art. 1(4) (amending Article 5 of Commission Regulation (EC) 692/2008).

¹⁰¹ Commission Regulation (EU) 2016/646, Art. 1(4) (amending Article 5 of Commission Regulation (EC) 692/2008).

¹⁰² See Proposed EU Type-Approval Regulation, Art. 23(4).

¹⁰³ See Proposed EU Type-Approval Regulation, Art. 9(1).

¹⁰⁴ See Proposed EU Type-Approval Regulation, Art. 9(5).

¹⁰⁵ See Proposed EU Type-Approval Regulation, Art. 6(6).

¹⁰⁶ See Proposed EU Type-Approval Regulation, Art. 80(3).

¹⁰⁷ Proposed EC Type-Approval Regulation, Art. 6(7), 8(7).

¹⁰⁸ See EC Type-Approval Directive, Arts. 29(1); 32(2).

¹⁰⁹ See Proposed EU Type-Approval Regulation, Art. 50(1).

¹¹⁰ See Proposed EU Type-Approval Regulation, Art. 58(3).

¹¹¹ See Regulation (EC) No 1049/2001; *see also* Aarhus Regulation, Article 6.

¹¹² See EC Type-Approval Directive, Art. 46; Regulation (EC) 715/2007, Art. 13(1); Proposed EU Type-Approval Regulation, Art. 89(1), (4).

¹¹³ See Proposed EU Type-Approval Regulation, Art. 89(5).

¹¹⁴ See Aarhus Regulation, Art. 6(1).

¹¹⁵ See EPA, *Freedom of Information Act (FOIA) – The FOIA Request Process*, available at: <https://www.epa.gov/foia/foia-request-process>.

¹¹⁶ United States Environmental Protection Agency, *Search – EPA’s Transportation and Air Quality Document Index System (DIS)* (website), available at <https://iaspub.epa.gov/otaqpub/>.

¹¹⁷ See FOIA at §552(a)(3)(A).

¹¹⁸ See FOIA at §552(b)-(c).

¹¹⁹ See 40 CFR §86.1803-01.

¹²⁰ See *e.g.* CAA at §§ 7521 and 7525.

¹²¹ See FOIA at §552(a)(3)(A).

¹²² See FOIA at §552(b)(1)-(9).

¹²³ FOIA at 5 U.S.C. §552(c).

¹²⁴ FOIA at §552(b)(3).

¹²⁵ See 40 C.F.R. §86.1803-01 (defining an “Auxiliary Emission Control Device” (AECD) as “any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of *activating, modulating, delaying, or deactivating the operation of any part of the emission control system*); *see also* 40 C.F.R. §86.1803-01 (defining “defeat device” as any AECD “that reduces the effectiveness of the *emission control system* under conditions which may reasonably be expected to be encountered in normal vehicle operation and use ...”).

¹²⁶ See *Gersh & Danielson v. EPA*, 871 F. Supp. 407, 410 (D. Colo. 1994) (holding that nearly identical disclosure provisions of the Clean Water Act displaced FOIA exemptions).

¹²⁷ FOIA at §552(b)(3).

¹²⁸ CAA §7525(a)(2) and (e).

¹²⁹ CAA §7521(a)-(b).

¹³⁰ See 40 CFR §86.1809-01(b).

¹³¹ See FOIA at §552(b)(4).

¹³² U.S. Dept. of Justice, Department of Justice Guide to the Freedom of Information Act, (most recent update 2009) pp. 266, available at: <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

¹³³ 40 CFR §2.201(c).

¹³⁴ 40 CFR § 2.201(e).

¹³⁵ 40 C.F.R. §2.208 (emphasis added)

¹³⁶ 40 CFR §2.208(e)(1).

¹³⁷ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

¹³⁸ U.S. Dept. of Justice, Department of Justice Guide to the Freedom of Information Act, (most recent update 2009) pp. 263-265, available at: <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

¹³⁹ This period may be extended by an additional 10 working days in cases where: (1) EPA must collect the requested information from field offices; (2) the request is “voluminous”; or (3) EPA must consult with another agency with a substantial interest in the responsive material or with two or more other offices of EPA. See FOIA at §552(a)(6)(B).

¹⁴⁰ FOIA at §552(b)(3).

¹⁴¹ See FOIA at §552(a)(4)(B).