

JUDGMENT OF THE COURT (Second Chamber)

21 April 2005^{*}

In Case C-186/04,

Reference for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decision of 1 April 2004, received at the Court on 22 April 2004, in the proceedings

Pierre Housieaux

v

Délégués du conseil de la Région de Bruxelles-Capitale,

interested parties:

Société de développement régional de Bruxelles (SDRB),

^{*} Language of the case: French.

Batipont Immobilier SA (BPI),

Immomills Louis de Waele Development SA (ILDWD),

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta,
P. Kúris, G. Arestis and J. Klučka (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure and further to the hearing on 20 January
2005,

after considering the observations submitted on behalf of:

- Pierre Housieaux, by J. Sambon and P. Reyniers, avocats,
- Délégués du conseil de la Région de Bruxelles-Capitale, by P. Coenraets and
C. Lepinois, avocats,

- Société de développement régional de Bruxelles (SDRB), by F. Krenc and P. Lambert, avocats,

- the Commission of the European Communities, by U. Wölker and F. Simonetti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2005,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Articles 3(4) and 4 of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56).

- ² This reference was made in the context of a dispute between Mr Housieaux and the Collège des délégués du conseil de la Région de Bruxelles-Capitale (Board of Delegates of the Council of the Brussels Capital Region) (hereinafter ‘the Board’) in relation to a decision by the Board on access to documents relating to an urban development contract.

Legal framework

Community legislation

3 Article 3(1) of Directive 90/313 provides:

‘Save as provided in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.

Member States shall define the practical arrangements under which such information is effectively made available.’

4 Article 3(2) and (3) of the same directive lists the reasons which may justify the refusal of a request for information.

5 Article 3(4) of the said directive is worded as follows:

‘A public authority shall respond to a person requesting information as soon as possible and at the latest within two months. The reasons for a refusal to provide the information requested must be given.’

6 Article 4 of Directive 90/313 provides:

'A person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision in accordance with the relevant national legal system.'

National legislation

7 By the Order of 29 August 1991 on access to information on the environment in the Région de Bruxelles-Capitale (*Moniteur belge* of 1 October 1991, p. 21505; hereinafter 'the 1991 Order'), the relevant provisions of Directive 90/313 were transposed into the law of that region.

8 Article 7 of the 1991 Order states:

'The Executive shall decide the list of categories of written documents which the authorities concerned must allow to be consulted immediately on the premises.'

9 Article 8 of the said order is worded as follows:

'As regards information other than the documents mentioned in Article 7, and without prejudice to an authority's power to allow it to be consulted immediately on the premises, the authority to which the request is addressed shall have one month in which to reply to the applicant in writing.'

Where, at the expiry of the time-limit indicated, no action has been taken on the request, the authority's failure to reply shall be deemed to constitute a decision to refuse access. In that case, the applicant may, by way of exception to Article 12 § 2, refer the matter directly to the Délégués du Conseil, who shall then decide on the request.'

10 Under Article 12 of the same order:

'§ 1. Only the Délégués du Conseil shall have the power to refuse access to information held by the authorities They shall exercise that power acting as a body and within the limits set out in Article 9.

§ 2. ... any authority which refuses to disclose information which is the subject of a request for access must inform the applicant of that decision and at the same time refer the matter to the Délégués du Conseil. Reference to the Délégués du Conseil is made by transmission of the request for access, together with a specimen or a copy of the information and the reasons which the authority considers justify the refusal of access. The time-limit mentioned in Article 8 § 1 shall be extended by one month from the date of the notification to the applicant of the reference to the Délégués du Conseil.'

11 Article 13 of the 1991 Order provides:

'Any total or partial refusal of access must set out the reasons which seek to justify it in a manner that is clear, precise, complete and genuine.'

12 Article 14 of the said order provides:

‘The Délégués du Conseil shall provide the applicant with the document requested or notify him of refusal of access within two months of his request. Failure to reply within that period shall be deemed to constitute a decision to refuse access. Their decision shall also be communicated to the authority to which the request for access has been referred.’

13 The 1991 Order does not establish any specific procedure for appealing against decisions of the Board concerning access to information on the environment and, therefore, the usual means of obtaining redress in administrative proceedings apply.

14 Thus, under Article 14(1) of the lois coordonnées sur le Conseil d’État (Consolidated Laws on the Council of State) (*Moniteur belge* of 21 March 1973, p. 3459), ‘the [Administrative Section of the Conseil d’État] shall rule by way of judgments on actions for annulment of acts and regulations of the various administrative authorities on the ground of infringement of procedural requirements which are essential or breach of which leads to nullity, or of abuse or misuse of powers’.

15 The Royal Decree of 23 August 1948 relating to proceedings before the Administrative Section of the Conseil d’État stipulates in the third paragraph of Article 4 that ‘actions referred to in Article [14] of the law shall be time-barred 60 days after publication or notification of the acts, regulations or decisions contested. If they are not required to be either published or notified, the time-limit shall run from the date on which the applicant becomes aware of them’.

The main proceedings and the questions referred for a preliminary ruling

- 16 In February 1991, the Région de Bruxelles-Capitale expropriated the site of a former military hospital for the benefit of the Société de développement régional de Bruxelles (hereinafter 'the SDRB'), which was designated as the operator for the redevelopment of the site. The SDRB then entered into a contract by private treaty (hereinafter 'the contract') with a temporary association made up of the companies Batipont Immobilier SA and Immomills Louis de Waele Development SA (hereinafter 'Batipont'). Under the terms of that contract, Batipont agreed to put up a complex of buildings and structures on the said site in accordance with a plan pre-established by the SDRB.
- 17 By letter of 21 March 1993 addressed to the President of the SDRB, Mr Housieaux asked to be allowed to consult the contract and to obtain a copy of it. By decision dated 5 April 1994, the SDRB refused the request on the ground that, according to the 1991 Order, it is the Executive which 'shall decide the arrangements for organising access to information for each individual public authority'.
- 18 On 22 April 1994, Mr Housieaux appealed to the Board against that decision, and repeated his request for access to the contract.
- 19 After various exchanges of correspondence with Mr Housieaux, the Board, having deliberated on 1 February 1995, took the decision to provide to the applicant Annexes H and I to the contract, which related to the environment and whose disclosure did not compromise any commercial or industrial interest. By letter of 3 February 1995, the Board informed Mr Housieaux and the SDRB of that decision.

20 Being dissatisfied with that decision, on 31 March 1995 Mr Housieaux brought an action before the Conseil d'État for annulment of that decision.

21 Before that court, the Board raised a plea of inadmissibility in respect of the action, based on the fact that the decision of 1 February 1995 was only a confirmatory decision which, as such, could not be challenged. The Board argued that, leaving aside the communication of Annexes H and I to the contract, that decision merely confirmed the implied refusal which had arisen earlier, owing to the failure of the Board to respond for over two months to the request for information which Mr Housieaux had submitted on 22 April 1994. That implied refusal became definitive when it was not challenged within the 60-day time-limit laid down in Article 14(1) of the lois coordonnées sur le Conseil d'État. Consequently, the Board maintains that on 31 March 1995 Mr Housieaux was time-barred from commencing an action for annulment of the refusal of 1 February 1995.

22 It is on that basis that the Conseil d'État decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the two-month time-limit in Article 3(4) of ... Directive 90/313 ... a directory time-limit — that is to say, merely indicative for the authority to which a request for information is addressed — or is it a mandatory time-limit with which that authority must comply?

(2) If the two-month time-limit is mandatory and on expiry of that time-limit the authority to which a request for information was addressed has not taken a decision, what is the "decision" referred to at the end of Article 4 of the directive

against which a judicial or administrative review may be sought “in accordance with the relevant national legal system”?

- (3) Do Articles 3(4) and 4 of the directive prohibit a “relevant national legal system” from interpreting a failure to respond on the part of the authority to which a request for information is referred — a failure to respond which continues throughout the two-month period referred to in Article 3(4) of the directive — as a decision implicitly refusing that request, a decision for which no reasons are thus given but which may be the subject of the judicial or administrative review provided for in Article 4?

- (4) If the two-month time-limit referred to in Article 3(4) of the directive is a directory time-limit, do Articles 3(4) and 4 of the directive preclude a “national legal system” from providing that the person requesting information may give the authority notice to respond to his request for information within a certain period, failing which the persistent failure by the authority to respond will be deemed to be an implied decision to refuse to provide the information, which can then be the subject of an administrative judicial review?

On the questions referred for a preliminary ruling

The first question

- 23 By its first question, the referring court is essentially asking whether the time-limit laid down in Article 3(4) of Directive 90/313 is indicative or mandatory.

- 24 In that regard, it must be noted, as the Advocate General has done in points 23 and 24 of her Opinion, that it follows from both the text and the spirit of that provision that the two-month time-limit must be regarded as mandatory.
- 25 First, the use of the phrase ‘as soon as possible and at the latest within two months’ clearly shows that the public authority that is competent to decide on the request for information (hereinafter ‘the public authority’) is required to comply with the time-limit imposed for considering the request and responding to it.
- 26 Second, if the time-limit was not mandatory but merely indicative, Article 4 of Directive 90/313, which provides for judicial protection for the individual, would be ineffective. Indeed, the person making the request for information would not know precisely the date from which he might seek review.
- 27 That interpretation of Article 3(4) of Directive 90/313 is supported by the directive’s objective, as set out in particular in the 11th recital in the preamble, which is that general information should actively be provided to the public on the state of the environment.
- 28 As the Advocate General has noted in point 24 of her Opinion, the value of that information depends to a large extent on the fact that individuals are able to obtain it as quickly as possible.
- 29 Having regard to those considerations, the answer to the first question must be that the two-month time-limit laid down in Article 3(4) of Directive 90/313 is mandatory.

The third question

- 30 By its third question, which it is appropriate to consider before the second question, the referring court is essentially asking whether Articles 3(4) and 4 of Directive 90/313 preclude national rules under which the failure of a public authority to respond to a request for information for two months is considered to give rise, at the end of that period, to an implied decision to refuse that request, a decision for which admittedly no reasons are given, but which may be the subject of a judicial or administrative review pursuant to Article 4 of the said directive.
- 31 In that respect, it must be recalled that the Court has already held that the fiction by which the failure of the authorities to reply is deemed to constitute an implied refusal cannot, as such, be considered incompatible with the requirements of Directive 90/313 on the sole ground that a tacit refusal, by definition, does not include any reasons (Case C-233/00 *Commission v France* [2003] ECR I-6625, paragraph 111).
- 32 On the other hand, the Court found that, in the case of an implied refusal of a request for information relating to the environment, the reasons for that refusal must be notified, even if after the date of the implied refusal, within two months of the submission of the initial request since that notification must, in that situation, be regarded as a 'response' for the purposes of Article 3(4) of the directive (*Commission v France*, cited above, paragraph 118).
- 33 Interpreting Article 3(4) of Directive 90/313 in that way alone preserves the effectiveness of the provision, the very wording of which implies that the public authority is required to give reasons for any decision to refuse a request for information.

34 By contrast to the national legislation in issue in *Commission v France*, cited above, according to which the failure of a public authority to reply to the request for information within one month was deemed to constitute an implied decision to refuse the request, the legislation in issue in the main proceedings deems there to be a tacit refusal after a failure to respond within two months following submission of the request.

35 It therefore follows from the judgment in *Commission v France*, cited above, that whereas, so as to grant effective judicial protection in accordance with Article 4 of Directive 90/313, the said directive does not preclude the fiction of implied refusal of a request for access to information where there has been a failure to respond within two months, by virtue of Article 3(4) of the directive it is unlawful for such a decision not to be accompanied by reasons when the two-month time-limit expires. In those circumstances, whilst the implied refusal does constitute a ‘response’ for the purposes of Article 3(4), it must be regarded as unlawful.

36 Accordingly, the answer to the third question must be that Article 3(4) of Directive 90/313, in conjunction with Article 4 thereof, does not preclude, in a situation such as that in the main proceedings, national legislation according to which, for the purposes of granting effective judicial protection, the failure of a public authority to respond within a period of two months is deemed to give rise to an implied refusal which may be the subject of a judicial or administrative review in accordance with the national legal system. However, by virtue of Article 3(4) it is unlawful for such a decision not to be accompanied by reasons when the two-month time-limit expires. In those circumstances, the implied refusal must be regarded as unlawful.

The second question

37 By its second question, the referring court asks what is the ‘decision’ which may be the subject of a review within the meaning of Article 4 of Directive 90/313, where no

decision has been taken by the public authority upon expiry of the two-month time-limit referred to in Article 3(4) of that directive.

38 The answer to that question is apparent from the explanations in relation to the third question, from which it follows that the failure of a public authority to respond within a period of two months is deemed to give rise to a decision that may be open to review in accordance with the national legal system.

39 Consequently, the answer to the second question must be that the decision referred to in Article 4 of Directive 90/313, against which a judicial or administrative review may be sought by the person who made the request for information, is the implied refusal which arises from the failure by the public authority competent to decide on that request to respond within two months.

The fourth question

40 In view of the answer to the first question, namely that the time-limit laid down in Article 3(4) of Directive 90/313 is mandatory, it is no longer necessary to answer the fourth question.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

1. **The two-month time-limit laid down in Article 3(4) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment is mandatory.**
2. **The decision referred to in Article 4 of Directive 90/313, against which a judicial or administrative review may be sought by the person who made the request for information, is the implied refusal which arises from the failure by the public authority competent to decide on that request to respond within two months.**
3. **Article 3(4) of Directive 90/313, in conjunction with Article 4 thereof, does not preclude, in a situation such as that in the main proceedings, national legislation according to which, for the purposes of granting effective judicial protection, the failure of a public authority to respond within a period of two months is deemed to give rise to an implied refusal which may be the subject of a judicial or administrative review in accordance with the national legal system. However, by virtue of Article 3(4) it is unlawful for such a decision not to be accompanied by reasons when the two-month time-limit expires. In those circumstances, the implied refusal must be regarded as unlawful.**

[Signatures]