



## EUROPEAN COMMISSION

LEGAL SERVICE  
The Director General

Ref. Ares(2016)2805485 - 16/06/2016

Brussels, 16 June 2016

Ms Luisa Izuzquiza  
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### BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

**Subject:** Request for access to documents

**Ref.:** Your application of 26 April 2016, registered under reference GestDem 2016/2228

Dear Ms Izuzquiza,

I refer to your application mentioned above requesting access to documents pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>.

Your application was registered on 27 April 2016 under reference GestDem 2016/2228.

### 1. SCOPE OF YOUR REQUEST

Your request of 26 April 2016 concerned "*all documents generated or received by the European Commission containing legal advice and/or analysis of the legality of the actions to be carried out by the EU and its Member States in implementing the actions set out in the statement on the agreement reached with Turkey at the summit held on 18 March 2016 (statement here: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>).*"

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<sup>1</sup> Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents (Official Journal L145, 31.05.2001, page 43).

In your request of 26 April 2016 you specified that you were interested in documents drawn up both before and since the meeting was held, to date.

On 5 April 2016 your previous application on the same subject was registered under reference GestDem 2016/1681. In the second part of that previous application you referred to *"all documents generated or received by the Commission containing legal advice and/or analysis of the legality of the actions to be carried out by the EU and its Member States in implementing the actions set out in the statement on the agreement reached with Turkey at the summit held on 7 March 2016."*

Considering that the summit held on 7 March 2016 had been a preparatory meeting of the summit held on 18 March 2016, the Legal Service, in order to answer to your previous request, had already identified and assessed the documents concerning the EU-Turkey statement that was made during the summit held on 18 March 2016.

Therefore, for the purpose of the present request for access to documents, only the documents produced by the Legal Service after 5 April 2016 have been considered, as the documents produced before that date have been treated in the framework of your first request for access to documents (registered under reference GestDem 2016/1681).

## **2. IDENTIFICATION OF THE DOCUMENTS**

After examination of the Legal Service's files, the following documents have been identified as falling within the scope your request:

1. series of four e-mails of 8 April 2016 from the Legal Service to DG NEAR, which contains the LS's comments on a letter concerning assurances on the treatment to be accorded by Turkey to Syrian nationals (reference Ares(2016)2655082).
2. e-mail of 11 April 2016 from the Legal Service to the cabinet of Mr Timmermans and to DGs HOME and NEAR on the question of the Greek Appeal Committees (reference Ares(2016)2655468).
3. series of two e-mails of 12 April 2016 from the Legal Service to DG HOME on the question of the practice of the Greek Appeal Committees (reference Ares(2016)2655140).

## **3. ASSESSMENT OF THE DOCUMENTS**

Having carefully examined the documents identified in point 2 on the basis of Regulation 1049/2001, I regret to inform you that they cannot be disclosed since they are covered by the exceptions provided for in the second indent of Article 4(2) (*"protection of court proceedings and legal advice"*)<sup>2</sup>; the second subparagraph of Article 4(3) (*"protection of*

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<sup>2</sup> *"The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] court proceedings and legal advice[...], unless there is an overriding public interest in disclosure".*

*the decision-making process*"<sup>3</sup>; and the third indent of Article 4(1) ("*protection of the public interest as regards international relations*")<sup>4</sup> of Regulation (EC) No 1049/2001 for the reasons explained below.

## **4 REASONS FOR REFUSAL OF DOCUMENTS**

At the outset, I wish to underline that Commission does not consider the EU-Turkey statement of 18 March 2016 as an international agreement within the meaning of Article 218 the Treaty on the Functioning of the European Union.

### **4.1 Protection of the court proceedings and legal advice**

Disclosure of the refused documents would, firstly, undermine the protection of legal advice provided for under the second indent of Article 4(2) of Regulation (EC) No 1049/2001 which, as recognised by the Court of Justice, must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice<sup>5</sup>.

Indeed, full disclosure of the refused documents would make known to the public internal opinions, drafted under the responsibility of the Legal Service and intended exclusively for the President and the Members of the Commission and for the Commission's service responsible for Migration and Home Affairs.

The refused documents concern highly sensitive issues discussed in the context of the EU-Turkey statement. Disclosing the legal analysis of the Legal Service at this point in time would clearly have a serious impact on the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice on this sensitive matter and would deprive the Commission of an essential element in the framework of its work on the implementation of the EU-Turkey statement.

Secondly, the sensitive legal issues assessed in the refused documents are already the subject of litigation at national level and might become subject of litigation before the European Court of Justice.

Disclosure of the refused documents could seriously undermine the Commission's position in possible litigation before the Court of Justice.

### **4.2. Protection of the decision-making process**

Disclosure of the refused documents would also prejudice the Commission's internal decision making-process as provided for in Article 4(3) second subparagraph of

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<sup>3</sup> "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."

<sup>4</sup> "The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards [...] international relations, [...]"

<sup>5</sup> C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, [2008] ECR p. I-4723, at para. 42.



Regulation 1049/2001. Indeed, although the statement between the EU and Turkey was made at the summit held on 18 March 2016, discussions on the implementation of the actions set out in this statement are still ongoing. The Commission has taken a clear position in its letter to the Greek authorities of 5 May 2016, and it may be called upon to take further positions in the future. The refused documents are relevant in this context. .

Furthermore, their disclosure would also affect ongoing discussions, closely linked to the EU-Turkey statement, on the Commission proposal for a Council Decision amending Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (COM/2016/0171 final)<sup>6</sup> and on the Commission proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Turkey) (COM (2016)279 final)<sup>7</sup>.

Disclosing those internal documents at this stage would seriously jeopardise the position of the Commission through the ensuing negative impact that the disclosure would have on the discussions in the European Parliament and the Council concerning the adoption of the above mentioned proposals.

Consequently, I consider that the refused documents are also covered by the exception provided for in the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

#### **4.3 Protection of the public interest as regards international relations**

Thirdly, I consider that full disclosure of the refused documents would also undermine the protection of international relations provided for under the third indent of Article 4(1) of Regulation (EC) No 1049/2001.

Making available the refused documents to the public would seriously prejudice the crucial relations between the European Union and Turkey in the context of this highly sensitive situation. This exception cannot be balanced against an overriding public interest.

In the light of the foregoing, I consider of paramount importance that the refused legal opinions remain confidential.

## **5. OVERRIDING PUBLIC INTEREST**

As already stated above, the exception under the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, ("*protection of the public interest as regards international relations*") is an absolute exception that cannot be balanced against an

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<sup>6</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464006499700&uri=CELEX:52016PC0171>

<sup>7</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464618201964&uri=CONSIL:ST\\_8671\\_2016\\_INIT](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464618201964&uri=CONSIL:ST_8671_2016_INIT)

overriding public test. All the documents are entirely covered by that exception, and there is therefore no need to assess the existence of an overriding public interest in disclosure.

Pursuant to Article 4(2) and (3) of that Regulation, however, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. I fully understand that transparency enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Unfortunately, in the present case, for the reasons explained above, I consider that the interest in transparency does not outweigh the general interest in ensuring that the Commission and its services receive frank, objective and comprehensive legal advice and that the institution's decision-making process is protected.

## **6. MEANS OF REDRESS**

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Brussels

or by e-mail to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

The Secretary-General will inform you of the result of such review within 15 working days from the date of registration of your request. You will either be given access to the document or your request will be rejected, in which case you will be informed of what further action is open to you.

Yours sincerely,



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Luis ROMERO REQUENA