



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

16 JUN 2016

Brussels,

Mr Vincent Harmsen
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BY EMAIL AND REGISTERED LETTER WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Your application for access to documents – Reference GestDem 2016/2286

Dear Mr Harmsen,

I refer to your application of 14 March 2016 by which you addressed to Directorate General for Health and Food Safety (DG SANTE) a request for access, under Regulation 1049/2001 (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, to the following documents:

"All correspondence (including emails), agendas, (working) documents, minutes of the meetings and any other reports of such meetings related to the Inter-Service Steering Group for the impact assessment concerning measures on animal cloning for food production in the EU (between December 2011 and January 2014)".

Your application was registered under reference GestDem 2016/1300. In dealing with your application, DG SANTE identified two documents drawn up by the Legal Service that would fall within the scope of your request. Therefore, as you were informed, this part of your request was transferred to the Legal Service (registered under reference GestDem 2016/2286). The present reply concerns the part of your request attributed to the Legal Service.

¹ OJ L145, 31.05.2001, page 43.

1. IDENTIFICATION AND ASSESSMENT OF THE DOCUMENTS

The identified documents falling under the scope of your request are the following:

1. e-mail of 22 February 2013 from the Legal Service to DG SANTE and to other Directorates General concerned (DGs) (reference Ares(2016)2758964).
2. attached to the previous e-mail was a draft of the Impact Assessment submitted by DG SANTE with the LS's comments in *track-changes*.

After a concrete examination of these documents, I have come to the conclusion that they cannot be disclosed since they are covered by the exceptions provided for in Article 4(2), second indent ("*the protection of legal advice*")² and Article 4(3) first subparagraph ("*the protection of the decision-making process*")³ of Regulation 1049/2001 (EC) No 1049/2001.

2. REASONS FOR REFUSAL

2.1. Protection of legal advice and of the decision-making process

On 18 December 2013, the Commission adopted the "*Proposal for a Directive of the European Parliament and of the Council on the cloning of animals of the bovine, porcine, ovine, caprine and equine species kept and reproduced for farming purposes*"⁴, the "*Proposal for a Council Directive on the placing on the market of food from animal clones*"⁵ as well as the Impact Assessment accompanying the referred proposals⁶. On 19 December 2013, the proposals were sent to the Council and the Parliament, thus starting the legislative process for its adoption, which is still pending.

Document under number 1 is an e-mail from the Legal Service to DG SANTE and to other DGs concerned which contains LS's general legal comments on the draft Impact Assessment. Document under number 2 is the draft Impact Assessment containing in *track-changes* the concrete legal comments of the LS. More precisely, it contains a legal assessment of the different options the Commission has considered in the procedure of the adoption of the two draft proposals for directives.

Please note that I cannot provide you with a more detailed description of the concerned documents without revealing their content and thereby depriving the invoked exceptions to the right of access of their purpose.

I must firstly underline that the refused documents were drawn up for purely internal purposes within the Commission in the context of preliminary consultations and deliberations in view of the adoption of the referred draft proposals for directives.

² "The institutions shall refuse access to a document where disclosure would undermine the protection of: – [...] legal advice [...] 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."

⁴ COM(2013)892 final.

⁵ COM(2013)893 final.

⁶ SWD(2013)519 final and SWD(2013)520 final.

I consider that disclosure of the refused documents would, firstly, undermine the protection of legal advice provided for under Article 4(2) second indent of Regulation (EC) N° 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 advice⁷. Indeed, disclosing the refused documents would make known to the public internal legal opinions of a highly sensitive nature drafted under the responsibility of the Legal Service and intended for the Commission's services responsible for preparing the two draft proposals for directives.

As stated above, the refused documents contain the LS's comments on legal issues raised by the draft proposals concerning the cloning of animals for farming purposes and the placing on the market of food from animal clones. In this regard, it has to be pointed out that, while the Impact Assessment was adopted on 18 December 2013, the legislative procedure for the adoption of the two directives is still ongoing and, therefore, the legal issues discussed in the refused documents are still relevant in the framework of the inter-institutional ongoing discussions.

Indeed, in the course of this legislative procedure the Commission has to formally issue an opinion in the first and second reading on the amendments of the co-legislators (Article 294(6), (7)(c) TFEU⁸). Where the Commission delivers a negative opinion on the Council's amendments, the latter has to adopt its amendments unanimously (Article 294(9) TFEU). Furthermore, the Commission can alter its proposal at any time during the legislative procedure, as long as the Council has not acted (Article 293(2) TFEU).

Under these circumstances, disclosing to the public the refused documents at this stage of the inter-institutional legislative procedure would have very adverse consequences both for the Legal Service's capacity to assist impartially the Commission and its services in this sensitive issue and for the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice. It would, therefore, deprive the Commission of an essential element in the framework of the negotiation of such draft proposals and for the adoption of sound decisions.

Secondly, the refused documents are also covered by the exception provided for in Article 4(3), first subparagraph ("*the protection of the decision-making-process*") of Regulation 1049/2001 (EC) No 1049/2001. Indeed, while the Impact Assessment and the draft proposals for two directives were adopted by the Commission on 18 December 2013, this decision is a procedural step marking the beginning of a complex inter-institutional process in which the Commission plays an important role, as indicated above. That inter-institutional procedure is still ongoing.

When preparing a decision the Commission's services must be free to explore all possible options free from external pressure. Disclosing the refused documents at this point in time would put in the public domain the possible positions and options the Commission may consider in the course of the legislative debate, thus submitting it to an important external pressure in a sensitive matter and seriously undermining its decision-making-process. Furthermore, disclosing the refused documents would also prejudice the Commission's margin of manoeuvre in the ongoing discussions with the co-legislators, thus severely reducing its capacity to contribute to reaching compromises as well as the best possible outcome of the negotiations.

⁷ Judgment of 1 July 2008 in *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, para. 42.

⁸ Treaty on the functioning of the European Union.

Should the Commission's decision-making process be considered closed with the adoption of its decision of 18 December 2013—*quod non*—the refused documents would, in the alternative, be covered by the exception provided for in Article 4(3), second paragraph of Regulation 1049/2001⁹ on the same grounds set out above.

In the light of the foregoing, I consider that the refused documents must remain confidential at this stage.

2.2. Possibility of granting partial access

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of giving partial access to the requested documents. However, after a careful examination of the documents concerned I have come to the conclusion that they are entirely covered by the invoked exceptions so that a partial disclosure is not possible.

2.3. Overriding public interest

Pursuant to Article 4(2) of Regulation 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. I understand the interest of transparency in that it 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.

In the present case, I consider that for the reasons set out above, taking in consideration the highly sensitive issues discussed in the refused documents, the interest in transparency do not outweigh the public interest of the Commission and its services to receive frank, objective and comprehensive legal advice and the need to protect that institution's decision-making process as well as the best outcome of the pending legislative procedure.

3. **MEANS OF REDRESS**

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the following address:

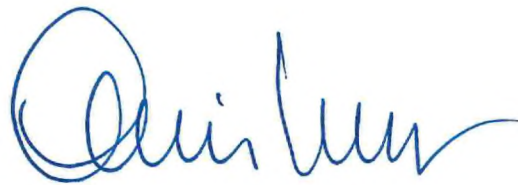
European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

⁹ "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 Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Luis Romero Requena', with a large circular flourish at the beginning.

Luis ROMERO REQUENA