



## EUROPEAN COMMISSION

LEGAL SERVICE  
The Director General

Brussels,                      **- 3 JUIN 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 5 April 2016, registered under reference GestDem  
2016/1681

Dear Ms Izuzquiza,

I refer to your application mentioned above, addressed to the Directorate-General for Migration and Home Affairs (DG HOME), requesting access to documents pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>.

On 5 April 2016 you informed the Secretariat-General of the Commission of your postal address and, on the same date, your application was registered under reference GestDem 2016/1681.

#### **1. SCOPE OF YOUR REQUEST**

Your request for access to documents consists of two parts:

*(a) all documents generated or received by the Commission containing the legal advice and/or analysis of the legality under EU and international law of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation OJ L 134, 7.5.2014;*

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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).

*(b) 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.*

As you have been informed, on 5 April 2016 your request has been transferred to the Legal Service as it is the service responsible for providing legal advice and/or analysis of the legality within the Commission.

## **2. FIRST PART OF YOUR REQUEST**

Concerning the first part of your request, after examination of the Legal Service's files, I would like to inform you that an inter-service consultation (ISC) was launched by DG HOME on a draft proposal for Council decisions authorising signature and conclusion of the EU-Turkey readmission agreement leading to the adoption by the Commission of the Proposal for a Council Decision of [ ... ] concerning the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (COM/2012/0239 final) and to Proposal for a Council Decision of [ ... ] on the signature of the Agreement between the European Union and the Republic of Turkey on readmission of persons residing without authorisation (COM/2012/0240 final).

The Legal Service marked its approval, in the Commission's decision-making process database, to the documents the DG presented in this ISC by inserting, on 8 May 2012, the comment "*positive opinion*" on the draft proposals with the addition of a track-change in the draft proposal for Council decision concerning the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation.

The track-change consisted of the adding on page 4, in the point starting with "Articles 16, 17 and 18 contain [...]" of the following "*and existing EU Directives. The agreement is without prejudice to other arrangements relating to areas other than readmission, such as voluntary return.*" This addition on page 4 is part of the final document as it has been published on eur-lex. It is therefore a public document<sup>2</sup>. You will find attached a copy of the reply of the LS to this ISC.

The Proposal for a Council Decision of [ ... ] on the signature of the Agreement between the European Union and the Republic of Turkey on readmission of persons residing without authorisation is also a public document<sup>3</sup>.

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<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0239&qid=1463756902600&from=EN>

<sup>3</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464343665797&uri=CELEX:52012PC0240>



### **3. SECOND PART OF YOUR REQUEST**

#### **3.1. IDENTIFICATION OF THE DOCUMENTS**

For this request for access to documents only the documents produced by the Legal Service (LS) until 5 April 2016, date of the registration of your request, have been considered. The documents produced after that date will be treated in the framework of your second request for access to documents (registered under reference GestDem 2016/2228).

After examination of the LS's files, the following documents have been identified as falling within the scope of the second part of your request.

1. Legal Service and DG HOME joint note of 7 March 2016 to the attention of the Cabinet of the President Juncker on the question of the return of asylum seekers to Turkey (reference Ares(2016)2453347).
2. e-mail of 9 March 2016 from the Legal Service to DG HOME, different members of the Commission's Cabinets and the Secretariat-General which contains the LS's comments on two documents concerning the questions return and resettlement (reference Ares(2016)2453181).
3. e-mail of 10 March 2016 from the Legal Service to DG HOME, to Cabinet of the President and to the Secretariat-General which contains the LS's comments on a document on the returning of asylum seekers to Turkey (reference Ares(2016)2443418)).
4. e-mail of 16 March 2016 from the Legal Service to DG HOME on return of asylum seekers to Turkey (reference Ares(2016)2447514).
5. two e-mails of 18 and 21 March 2016 from the Legal Service to DG HOME on the question of the Greek Appeal Committees (reference Ares(2016)2447359).
6. e-mail of 29 March 2016 from the Legal Service to DG HOME which contains the LS's comments on a document on the readmission of asylum seekers (reference Ares(2016)2444871).
7. two e-mails of 28 and 29 March 2016 from the Legal Service to DG HOME on the readmission of asylum seekers (reference Ares(2016)1901172).
8. e-mail of 31 March 2016 from the Legal Service to DG HOME which contains the LS's comments on the information sharing with Turkish authorities (reference Ares(2016)1901080).

#### **3.2. ASSESSMENT OF THE DOCUMENTS**

Having carefully examined the documents identified in point 3.1. 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>4</sup>; the second subparagraph of Article 4(3) ("*protection of the decision-making process*")<sup>5</sup>; and the third indent of Article 4(1) ("*protection of the public interest as regards international relations*")<sup>6</sup> of Regulation (EC) No 1049/2001 for the reasons explained below.

### **3.3. REASONS FOR REFUSAL OF DOCUMENTS**

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

#### **3.3.1 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>7</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.

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<sup>4</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".

<sup>5</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>6</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>7</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.



### **3.3.2. 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 Regulation 1049/2001. Indeed, although the EU-Turkey statement 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>8</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>9</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.

### **3.3.3 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.

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<sup>8</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464006499700&uri=CELEX:52016PC0171>

<sup>9</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)

### 3.4. 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 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.

### 4. 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,



Luis ROMERO REQUENA