



## EUROPEAN COMMISSION

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**Helen DARBISHIRE**  
**Access Info Europe**  
Calle Cava de San Miguel 8, 4c  
28005 Madrid  
Spain

### **DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2016/2791**

Dear Mrs Darbshire,

I refer to your letter of 18 August 2016, registered on 25 August 2016, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> ('Regulation 1049/2001').

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

In your initial application of 19 May 2016, addressed to the Commission's Legal Service (LS), you requested access to *legal advice generated by and/or provided to the Commission regarding the lobby register, including any and all legal advice that considers the treaty basis for the register and whether or not it could be mandatory*.

The LS has identified the following documents as falling under the scope of your request:

- (1) Note of the Legal Service to the Secretary General of 12 September 2006 (reference JUR(2006)30417);
- (2) Note of the Legal Service to the Secretariat General of 17 September 2007 (reference JUR(2007)30478);

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

- (3) Note of the Legal Service to the Head of Cabinet of Vice-President Maroš Šefcovič of 2 October 2013 (reference Ares(2013)3191712).

In its initial reply of 27 July 2016, the LS granted partial access to all of the above-mentioned documents. The undisclosed parts were redacted on the exceptions provided for in Article 4(2), second indent (protection of legal advice), Article 4(3), first subparagraph (protection of the decision-making process) and Article 4(1)(b) (protection of personal data) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position and present a series of arguments supporting your view. These will be addressed in the respective parts of this decision.

I note that in your confirmatory application you explicitly point out that you do not wish to receive access to the parts redacted on the basis of the exception provided for in Article 4(1)(b) of Regulation 1049/2001. The scope of this confirmatory decision is therefore limited to the parts of the documents to which access was refused at initial stage based on the remaining two exceptions mentioned above.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of the LS not to grant full or further partial access to the documents requested, based on the exceptions of Article 4(2), second indent (protection of legal advice) and Article 4(3), first subparagraph (protection of decision-making process) of Regulation 1049/2001, for the reasons set out below.

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

Article 4(2), second indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] court proceedings and legal advice*

Article 4(3) of Regulation 1049/2001 provides that *[a]ccess 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.*

In your confirmatory application, you argue that *[t]he Commission does not explain how exactly disclosure of each of the [undisclosed parts of the] documents could specifically and effectively undermine the protection of legal advice*. This view is supported with a detailed argumentation according to which the Commission did not provide a proper statement of reason demonstrating a link between the public release of the documents requested and the protection of the legal advice reflected therein.

You also consider that the link between the refusal to release of the undisclosed parts of the documents and the underlying reasoning based on an alleged harm to the decision-making process has not been established by the Commission in a sufficiently clear and comprehensive manner.

As you question the applicability of both exceptions based on a similar reasoning, I will address these two exceptions together in this decision. Both exceptions apply to the redacted parts of the documents.

Documents (1) and (2) were prepared by the Commission's Legal Service in the context of the preparatory work relating to the adoption of the Commission's proposal for the 2011 Interinstitutional Agreement<sup>3</sup>, which in turn, led to the establishment of the Transparency Register for organisations and self-employed individuals engaged in EU policy-making and policy implementation. Document (3), as explained by the Legal Service, was prepared following the request of the Cabinet of the Commission's Vice-President in charge of inter-institutional relations for the revision of the Interinstitutional Agreement in 2014<sup>4</sup>. All three documents contain information constituting the assessment of various legal aspects discussed in the early phase of the preparation of the Agreement (documents (1) and (2)), or during the inter-institutional adoption process (document (3)).

Documents (1) and (3) contain considerations regarding the possibility of rendering the common register of lobbyists mandatory and to a possible legal basis to that effect. Document (2) examines the issue of the possible sanctions under the Code of Conduct<sup>5</sup>. The information contained in documents (1) – (3) therefore constitutes legal advice within the meaning of Article 4(2), second indent of Regulation 1049/2001.

These legal opinions are of particular sensitive nature. Firstly, Documents (1) and (3) relate to the different options as to the legal basis for a mandatory register of lobbyists. Document (3) is in addition a legal opinion of particularly wide scope as it gives a detailed interpretation of Articles 298 and 352 of the TFEU. This advice is thus not only relevant in the context of the current discussions on the lobby register but will be relevant in the framework of future questions where the interpretation of the concerned Articles may arise. The redacted parts of Document (2) relate to specific advice as to the attitude

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<sup>3</sup> European Parliament decision of 11 May 2011 on conclusion of an interinstitutional agreement between the European Parliament and the Commission on a common Transparency Register.

<sup>4</sup> Agreement of 19 September 2014 between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, OJ L 277, 19.9.2014, p. 11–24.

<sup>5</sup> Annex III to the Inter-institutional Agreement that establishes the standards of behaviour which must be respected by all interest representatives in their relations with the EU institutions

of the Commission in case of non-compliance with the Code of Conduct and to specific options for sanctions in such situation. These sensitive legal questions have to be protected as the Commission has just launched a proposal for a new Interinstitutional Agreement on a mandatory Transparency Register covering besides the European Parliament and the Commission, the Council of the EU, to replace the 2014 version.

In spite of the fact that the decision-making process linked to the adoption of the follow-up (2014) Interinstitutional agreement has been finalised, the information contained in the undisclosed parts of documents (1) – (3) is thus still very relevant in the context of the currently ongoing revision of the Interinstitutional agreement and the establishment of a new version of the Transparency Register.

In particular, the undisclosed information included in partially released documents (1) – (3) is still relevant for the purpose of the ongoing internal and further interinstitutional discussions, especially considering that in the context of those discussions, the Commission may be called upon, during or following that process, to review its proposal.

Documents (1) – (3), which were drafted for internal use, therefore contain information relating to a matter for which a decision has not been yet taken, as the above-mentioned revision process is still fully ongoing. As the Legal Service explained in its initial reply, public disclosure of the redacted internal legal opinions reflected in documents (1) – (3), before the three institutions have adopted the interinstitutional agreement, could be used instrumentally by external parties trying to exert pressure on the decision and on the negotiation process. It would also lead to erroneous and premature conclusions about the Commission's rationale for opting for specific solutions in its proposal. That, in turn, would compromise the Commission's interest in, and possibilities for, seeking and receiving frank, objective and comprehensive legal advice. It would also have a negative effect on the ongoing discussions regarding the Commission's proposal for the new agreement, and on the Commission's margin of manoeuvre during these discussions. Indeed, depending on the outcome of these negotiations, the Commission may be called upon to revise its proposal. Releasing the internal legal opinions requested would undermine the Commission's freedom to explore all possible options free from external pressure<sup>6</sup>.

It needs to be emphasised that the revision of the Interinstitutional Agreement is attracting a lot of attention of various actors representing opposing interests. Therefore, I consider the risk of such external pressure as reasonably foreseeable and not purely hypothetical.

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<sup>6</sup> Judgment of 13 November 2015, in cases T-424/14 and T-425/14, *ClientEarth v Commission*, (ECLI:EU:T:2015:848), paragraphs 94-96.

Consequently, full public release of documents (1) – (3), would seriously undermine these decision-making processes, as it would reveal preliminary legal assessments relating to the policy options which are currently under consideration in the framework of the ongoing inter-institutional discussions.

In light of the above, I consider that the use of the exception under Article 4(2), second indent (protection of legal advice) and Article 4(3), first subparagraph of Regulation 1049/2001 (protection of the decision-making process) is justified, and that access to the undisclosed parts of documents (1) – (3) must be refused on that basis.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2), second indent and Article 4(3), first subparagraph of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that such an overriding public interest exists in this case and put forward a series of arguments in support of your view. These arguments are concentrated around three issues. Firstly, you point out that full disclosure of the documents requested would allow for *a balanced and informed public debate to facilitate better decision making*. Secondly, the release of the undisclosed parts of the documents would help to obtain *the best possible outcome in transparency register reform*. Finally, public disclosure of documents (1) – (3) would be beneficial for *ensuring accountability of EU Institutions and citizen participation*.

I understand that certain entities and organisations (which are part of the public) might have an interest in obtaining access to the documents in question. Nonetheless, I do not consider that the public release of the internal documents in question would be the most effective and appropriate way to achieve the results mentioned in your confirmatory application. As already mentioned in part 2 of this decision, the Commission is very much aware of the fact that reform of the Transparency Register is attracting a lot of attention of various actors, stakeholders and citizens. To this end the Commission invited the latter to have their say through the launch of a public consultation on the Transparency Register and its revision, which was recently closed. The Commission has received in this framework 1766 replies from stakeholders. The results were reflected in a report, which is publicly available on the Transparency Register website, and the Commission takes into account these results when drafting its proposal for a new Interinstitutional Agreement. The Commission has therefore put in place all necessary mechanisms in order to ensure full accountability, a balanced debate and citizen participation.

It is not clear how releasing documents of a purely internal nature would add to that transparency. As emphasised above, the review process is at a very early stage, and the Commission is dedicated to continuing keeping that debate free from undue external pressure in order to achieve the best outcome.

Having regard to the above, I consider that at this stage, any possible public interest in transparency cannot outweigh the public interest in safeguarding the legal advice and the decision-making process protected, respectively, by the second indent of Article 4(2) and Article 4(3) of Regulation 1049/2001.

Nor have I been able to identify any other public interest capable of overriding the public and private interests protected by Article 4(2), second indent and Article 4(3), first subparagraph of Regulation 1049/2001.

#### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested. However, for the reasons explained above, no further partial access is possible without undermining the interests described above.

In your confirmatory application you contest this by arguing that the Commission *has failed to indicate whether all the exceptions apply to all redacted text of all the documents, or whether there are parts which, for example, fall under only the decision-making exception and not that for protection of legal advice.*

As explained above, the entirety of the information<sup>7</sup> included in documents (1) – (3) constitutes legal advice within the meaning of Article 4(2), second indent of Regulation 1049/2001 and would put at risk the current decision making process of the institution if disclosed. Having examined these documents, I have come to the conclusion that no further partial access is possible to the undisclosed parts without undermining the interests referred to above. Consequently, access thereto is refused on the basis of the exceptions referred to above.

#### **5. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

#### **6. PARTS OF YOUR APPLICATION FALLING OUTSIDE THE SCOPE OF REGULATION 1049/2001**

In your confirmatory application you point out that the initial reply was provided by the LS with a significant delay. To this end, you request the Secretariat-General to *address the question what the Commission is doing to solve the problem of serious delays in responding to requests.*

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<sup>7</sup> Other than personal data, to which refusal of access was not contested in your confirmatory application.

I certainly regret that the initial reply was not provided to you within the deadlines of Regulation 1049/2001 and can assure you that the Secretariat-General consistently endeavours to ensure the best possible application of Regulation 1049/2001 by all Commission services.

Yours sincerely,



*For the Commission*  
*Alexander ITALIANER*  
*Secretary-General*