



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, - 3. 06. 2013

By e-mail

Mrs Andrea Fuchs
ask+request-299-85ca3813@asktheeu.org

Subject: Request for access to documents

Ref.: Your e-mail of 21 December 2012, registered under reference GESTDEM 2012/5988

Dear Mrs. Fuchs,

I refer to your request mentioned above requesting access to documents relating to Cases F-132/07 Guido Strack v. Commission and T-199/11P Guido Strack v. Commission, in accordance with Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents¹.

1. SCOPE OF YOUR REQUEST

Your request has been made in an extensive manner and concerns all documents relating to both the administrative phase and those concerning the proceedings before the Civil Service Tribunal (CST) and the General Court, including contracts with the external lawyers.

As you have been informed, the part of your request concerning the administrative phase was attributed to Directorate-General Human Resources and security (HR DG) and registered as GESTDEM 2013/215 and the part referring to the courts proceedings was transferred to the Legal Service and registered as GESTDEM 2012/5988.

2. PROPOSAL FOR A FAIR SOLUTION

At the end of December 2012, the Commission received three requests for access to all documents concerning 10 court cases, to which Mr. Strack was a party. These requests originated from you and two other members of the governing body of the network "Whistlerblower", whose president is Mr. Strack².

¹ OJ L 145, 31.05.2001, page 43.

² This information is publicly available on the website
<http://www.whistleblower-net.de/uber-uns/vorstand/>

After conducting a preliminary assessment of your request, it appeared, on the one hand, that it involved a large number of documents and, on the other, that they would require a very careful and in-depth assessment since they were likely to contain sensitive personal data to be protected under Regulation 1049/2001.

Taking into account the workload resulting from your request and considering the aforementioned two additional applications, by e-mail of 18 January 2013 the Legal Service informed you that it would not be in a position to reply to your request within the deadline foreseen at article 7 of Regulation 1049/2001. Therefore, in accordance with Article 6(3) of this Regulation it invited you to reconsider your request in limiting and specifying its scope and to indicate a priority order to deal with the requested documents.

In response to your e-mail of 27 January 2013, the Legal Service informed you on 4 February 2103 that it intended to communicate to you a list of the documents concerned together with a proposal for a calendar to deal with your request. By e-mail of 11 February 2013 you refused this approach.

Nevertheless, you will find below the reply of the Legal Service as regards the part of your request as regards the documents relating to court's proceedings F-132/07 and T-199/11P.

3. DOCUMENTS CONCERNED BY YOUR REQUEST RELATING TO THE COURT'S PROCEEDINGS

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

Affaire F-132/07 – Strack c/ Commission

1. JUR(2007)46143 – Note to the attention of M. Chêne (ex-DG ADMIN) on the amicable settlement procedure
2. JUR(2007)46150 – Letter to the CST on the amicable settlement procedure
3. JUR(2007)46159 – Note to ex-DG ADMIN DG sending the application
4. JUR(2007)46194 – Authority
5. JUR(2008)45041 – Letter to the CST on the amicable settlement procedure
6. JUR(2008)45158 – Letter to the CST on the amicable settlement procedure
7. JUR(2008)45249 – Letter to the CST on the amicable settlement procedure
8. JURM(2008)9113 – Objection of inadmissibility
9. CONT(2009)7026 – Order of 17 September 2009 (Objection of inadmissibility – Procedure by default)
10. PVR(2009)752 – Authority
11. JURM(2009)9202 – Defence
12. JUR(2009)45835 – Letter sending legal assistance contracts SJ/2009/1411, SJ/2009/1412, SJ/2009/1438, SJ/2009/1439 et SJ/2009/1440
13. JUR(2009)45841 – Legal assistance contract (Case F-132/07)
14. LETT(2010)5620 – Attorney's fees invoice
15. JUR(2010)45449 – Letter to the CST concerning CD-ROM attached as annex by the Applicant
16. LETT(2010)5946 – Attorney's fees invoice
17. Ares(2010)823658 – Authority
18. Ares(2010)900388 – Letter sending legal assistance contract SJ/2010/1733
19. Ares(2011)202948 – Letter to the Applicant concerning recovery of costs
20. Ares(2011)308411 – Corrigendum to document Ares(2011)202948

Affaire T-199/11P – Strack c/ Commission

21. Ares(2011)813172 – Authority
22. Ares(2011)855275 – Legal assistance contracts SJ/2011/1959
23. Ares(2011)973879 – Response
24. Ares(2011)1085125 – Attorney's fees invoice
25. Ares(2012)210783 – Letter to the lawyer sending the request to stay proceedings
26. Ares(2012)282500 – Observations on the request to stay proceedings
27. Ares(2012)738642 – Report for the hearing
28. Ares(2012)874109 – Attorney's fees invoice
29. Ares(2013)256217 – Letter to the Applicant concerning recovery of costs

4. ASSESSMENT

4.1. Documents fully disclosed (with the exception of some personal data): documents under numbers 3, 4, 8, 9, 10, 11, 15, 17, 21, 23, 25, 26 and 27

After a concrete assessment of these documents, I am pleased to inform you that, in accordance with Regulation, full access can be granted to documents under numbers 3, 4, 8, 9, 10, 11, 15, 17, 21, 23, 25, 26 and 27 with the exception of the following personal data which is covered by the exception provided for in Article 4(1)(b) ("*protection of personal data*")³ of Regulation 1049/2001 in accordance with the European Union (EU) legislation regarding the protection of personal data:

- document under number 11 (reference JURM(2009)9202): the name of the applicant's doctor (page 13).
- document under number 23 (reference Ares (2011)973879): the name of a judge (page 6), accused by the applicant of not being impartial.

Disclosure of this information, which was not disclosed nor by the TFP either by the General Court, would undermine the legitimate privacy rights of the concerned persons and, therefore, would be contrary to Article 4(1)(b) of Regulation 1049/2001. Indeed, according to Article 8(b) of Regulation No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁴, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. In the present case, I see no elements capable of showing the necessity for the refused data to be disclosed⁵.

³ "The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data".

⁴ OJ L 8, 12.01.2001, page 1.

⁵ Judgment of the Court of Justice of 29 June 2010, Case C-28/08P, European Commission v The Bavarian Lager Co. Ltd (paragraphs 77-78), European Court reports 2010 page I-06051.

Accordingly, you will find enclosed a copy of the documents under numbers 3, 4, 8, 9, 10, 15, 17, 21, 25, 26 and 27 as well as an expunged version of documents under numbers 11 and 23. Please note that these documents cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.

Document under number 9 is a public document which is available on the website of the Court⁶.

4.2. Documents under numbers 12, 13, 14, 16, 18, 19, 20, 22, 24 and 28 (letters to the external lawyer, legal assistance contracts and external lawyer's fees invoices)

After a concrete assessment of these documents, I regret to inform you that they cannot be disclosed since they are covered by the exception provided for in Article 4(2), second indent of Regulation 1049/2001 (*"the protection of the court proceedings"*)⁷. Indeed, even though the Court and the General Court rendered their judgments in Cases F-132/07 and T-199/11P on 20 January 2011 and on 13 December 2012, respectively, these documents will be subject of discussion in the framework of the ongoing procedure for the recovery of costs in accordance with the judgments at stake. Therefore, disclosure of these documents at this stage would be adversely affecting the decisions to be taken in the context of the referred procedure. In addition, disclosure of the refused documents would also weaken the Commission position in any possible dispute relating to this matter, including its right of defence. This risk is not hypothetical but a real and concrete one.

4.3. Documents relating to the "amicable settlement" procedure

Documents under numbers 1, 2, 5, 6 and 7 were drawn up by the Commission in the context of the procedure with a view to seeking an amicable settlement of the Cases F-118/07, F-119/07, F-120/07, F-121/07 and F-132/07, *Guido Strack v. Commission*. However, this attempt to reach an amicable settlement was unsuccessful.

Document under number 1 is a note to the attention of the Director General of the ex-Directorate-General for Administration (ex-DG ADMIN) summarising the draft agreement contained in the minutes of an informal meeting held by the parties at the CST and asking for observations. Documents under numbers 2, 5, 6 and 7 are Commission's submissions to the CST. Therefore, all these documents concern Cases F-118/07, F-119/07, F-120/07, F-121/07 and F-132/07.

Case F-118/07, *Guido Strack v. Commission*, seeking the payment for material and non-material damages, including damage to the applicant's health, is still pending before the Civil Servant Tribunal (CST).

Documents under numbers 1, 2, 5, 6 and 7 are, therefore, covered by the exception provided for in Article 4(2) second indent of Regulation 1049/2001 (*"the protection of court proceedings"*)

⁶ <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=f-132/07&td=ALL>

⁷ "[T]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings [...] unless there is an overriding public interest in disclosure".

The purpose of the "*court proceedings*" exception is to maintain the independence of the EU institutions in their dealings with the Court and to ensure the proper course of justice. In this regard, the Court of Justice has stated in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P that the pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently more a part of the judicial activities of the Court and that these activities are as such excluded from the scope of the right of access to documents without any distinction being drawn between the various procedural stages, in the light of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity⁸.

In addition, the Court has recognized that "*[i]t is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, [...], while those proceedings remain pending*"⁹.

Since Case F-118/07 is still pending before the CST, I consider that documents under numbers 1, 2, 5, 6 and 7, which have been drawn up by the Commission solely for the purpose of the referred specific proceedings, are clearly covered by the exception provided for in Article 4(2) second indent of Regulation 1049/2001 and, consequently, cannot be disclosed at this stage of the proceedings.

Furthermore, I would like to point out that according to Article 69(1) first and third paragraphs of the Rules of Procedure of the European Union Civil Service Tribunal¹⁰, where the parties come to an agreement before the Tribunal or the Judge-Rapporteur as to the solution putting an end to the dispute, the President, at the request of the applicant and the defendant, shall set out the terms of the agreement in the order removing the case from the register. It is therefore clear that, *a contrario*, where the parties don't come to an agreement, such in the present case, the observations, suggestions, proposals and concessions made by the parties and contained in the documents drawn up for the purposes of the amicable settlement, are not subject of such a publication and must, therefore, remain confidential.

5. THIRD PARTIES' DOCUMENTS: documents submitted by the applicant and documents originating from the Courts

Regarding, on the one hand, the submissions lodged by the applicant to the CST and to the General Court in Cases F-132/07 and T-199/11P and, on the other hand, the documents originating from those courts, the Commission considers that they do not fall within the scope of Regulation 1049/2001. Regulation 1049/2001 is based on Article 255¹¹ of the Treaty establishing the European Community which has been replaced by Article 15 of the

⁸ Judgment of the Court of 21 September 2010 in Joined Cases C-514/07P, C-528/07P and C-532/07P Sweden v API and Commission, API v Commission and Commission v API (paragraphs 77, 79 and 92), European Court reports 2010, Page I-08533.

⁹ Paragraph 94.

¹⁰ http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-04/rp_14_04_2010_en.pdf

¹¹ This article applied only to the European Parliament, the Council and the Commission but no to the European Court of Justice.

Treaty on the functioning of the European Union (TFUE) with the entry into force of the Lisbon Treaty on 1 December 2009. Whilst Article 15(3) TFUE extends the right of access to the documents of the Union institutions, bodies, offices and agencies, its fourth paragraph provides that *"The Court of Justice of the European Union [...] shall be subject to this paragraph only when exercising their administrative tasks"*.

It is therefore clear that even after the adaptation of Regulation 1049/2001 to the Lisbon Treaty, documents submitted by the third parties such as, in this case, the submissions made by the applicant as well as the documents originating from the Court of Justice of the European Union in the framework of court proceedings, will not fall under the scope of the regime for public access to documents. Indeed, the Commission itself received a copy of these pleadings and documents only by virtue of its quality as party to the proceedings, pursuant to Article 20 of the Protocol on the Statute of the Court of Justice¹².

Furthermore, as regards pleadings submitted in court proceedings, the Court has stated in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P *"[...], the Rules of Procedure of EU Courts provide for procedural documents to be served only on the parties to the proceedings [...]. It is clear, therefore, that neither the Statute of the Court of Justice nor the above Rules of Procedure provide for any third-party right of access to pleadings submitted to the Court in court proceedings"*¹³.

In the light of the above, the Commission takes the view that, as far as court proceedings are concerned, the scope of Regulation 1049/2001 is limited to the institution's own submissions, whereas submissions lodged by the other parties as well as the documents originating from the Court of Justice of the European Union do not fall within its scope. Otherwise, the purpose of both Article 15 TFUE and the Rules of Procedure of the Court of Justice would be undermined.

Consequently, I regret to inform you that the submissions lodged by the applicant and the documents originating from the CST and the General Court in Cases F-132/07 and T-199/11P cannot be made available to you.

6. 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 document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected under Article 4(2). In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of documents under numbers 1, 2, 5, 6, 7, 12, 13, 14, 16, 18, 19, 20, 22, 24 and 28 that would outweigh the public interest in the protection of the court proceedings, including the institution's rights of defence.

¹² OJ C 115, 09.05.2008, page 215.

¹³ Judgment of the Court of 21 September 2010 in Joined Cases C-514/07P, C-528/07P and C-532/07P *Sweden v API and Commission* (paragraphs 98 and 99) published in the European Court reports 2010 Page I-08533.

7. 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 address below.

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 refused parts or your request will be rejected, in which case you will be informed of what further action is open to you.

All correspondence should be sent to the following address:

The Secretary General
European Commission
B-1049 BRUSSELS
Sg-Acc-Doc@ec.europa.eu

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Luis Romero Requena', with a stylized, flowing script.

Luis ROMERO REQUENA

Enclosures: 12 documents