



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 21st September 2018

Ms Luisa Izuzquiza
Open Knowledge Foundation
Deutschland e.V.
Singerstr. 109
10179 Berlin
Germany

ask+request-5707-926f2540@asktheeu.org

BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your application of 3 July 2018, registered under reference GestDem 2018/3567

Dear Ms Izuzquiza,

I refer to your application mentioned above, addressed to the Commission's Legal Service, in which you request access to documents pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹. Your request concerns *"all documents generated or received by the European Commission containing legal advice and/or an analysis of the legality of the so-called disembarkation centres, disembarkation platforms, and/or regional disembarkation arrangements as presented at the Informal Working Meeting of 24 June 2018. I am interested in documents drawn up both before and since the meeting was held, to date [...]."*

On the same date you addressed an identical request to the Directorate-General for Migration and Home Affairs (DG HOME) but concerning *"all documents generated or received by the DG HOME"*. As you were informed this request has been registered under reference GestDem 2018/3569.

1. IDENTIFICATION OF THE DOCUMENTS

Therefore, for the purpose of your request only *"the documents generated or received by the Legal Service"* have been considered. The Legal Service has identified the following legal opinion as responding to the terms of your request:

¹ Official Journal L145, 31.05.2001, page 43.

- e-mail of 26 June 2018 (15h19) to DG HOME containing in attachment the Legal Service's observations, in the form of *track-changes*, on the document "*Follow-up to the informal Meeting of 24 June 2018 – The legal and practical feasibility of disembarkation options*" (document reference sj.g(2018)5231966).

Please note that the Legal Service has not identified any document drawn up before the Informal Working Meeting.

2. ASSESSMENT OF THE IDENTIFIED DOCUMENT

After a carefully assessment of the identified document on the basis of Regulation 1049/2001, I consider that only partial access can be granted to the requested document. The refused parts of the document cannot be disclosed since they are covered by the exceptions provided for in the second indent of Article 4(2) ("*protection of legal advice*"); the second subparagraph of Article 4(3) ("*protection of the decision-making process*") and the third indent of Article 4(1) ("*protection of the public interest as regards international relations*") of Regulation (EC) No 1049/2001 for the reasons explained below. Furthermore, personal data contained in the e-mails by DG HOME and the Legal Service has been deleted according to the exception provided for in Article 4(b) of that Regulation ("*protection of personal data*"), in accordance with the European Union legislation regarding the protection of personal data.

3. FRAMEWORK AND REASONS FOR REFUSAL

On 26 June 2018 DG HOME sent by e-mail (13h06) to the Legal Service a consultation on the draft document "*Follow-up to the informal Meeting of 24 June 2018 – The legal and practical feasibility of disembarkation options*". The Legal Service replied to this consultation by e-mail of 26 June 2018 (15h19), identified above as the document responding to your request. By e-mail of 26 June 2018 (19h40) DG HOME sent a revised version of the document to the Cabinet of the President and to the Secretary General of the Commission. The final version has been published by the Commission under the link:

https://ec.europa.eu/commission/sites/beta-political/files/migration-disembarkation-june2018_en.pdf

3.1 *Protection of legal advice*

I consider that full disclosure of the requested document would, firstly, undermine the protection of legal advice provided for under the second indent of Article 4(2) of Regulation (EC) No 1049/2001² 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 advice³. Disclosure of the withheld parts would make known to the public internal opinions, drafted under the responsibility of the Legal Service in response to a consultation by the Commission's service responsible for migration matters and intended to assist the President of the Commission and its Secretary General.

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 Judgement of the Court of Justice of 1 July 2008, joined cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, ECLI:EU:C:2008:374, paragraph 42.

At the outset, it should underline that the identified document has not been drawn up for the purpose of any legislative proposal. It contains legal advice of an internal and preliminary nature on the complex and highly sensitive issue of disembarkations of migrants rescued in the Mediterranean Sea. As it is said in the introduction of the document made public by the Commission, it contains a first assessment of the legal and practical feasibility of three different scenarios on disembarkation presented at the Informal Working Meeting of 24 June 2018. The issues assessed in this document were also subject of discussion in the framework of the European Council on 28 June 2018. In its conclusions the European Council invited the Council and the Commission to swiftly explore the concept of "*controlled centres*" on EU territory and the possible way forward for the establishment of "*regional disembarkation arrangements with third countries*". Following the call by EU leaders, on 24 July 2018 the Commission has given a first outline of the referred questions⁴, which are still currently subject of discussion within the Commission and with Member States. Furthermore, the question of the "*regional disembarkation arrangements*" will be open to discussion with the interested third countries, once a common EU approach is agreed.

The refused legal opinion was sought at short notice by DG HOME, as evidenced by the terms of the consultation and the time elapsed between that consultation, the reply of the Legal Service and the sending of the document to the President's Cabinet and the Secretary General by DG HOME. Disclosure of such preparatory and internal legal assessment at this point in time would clearly have, in a foreseeable manner, a serious impact on the Commission's interest in seeking and receiving frank, objective and on the Legal Service's capacity to assist the Commission and its services in the assessment of this complex and sensitive matter, still subject of ongoing discussions. The frankness, objectivity and comprehensiveness, as well as the expeditiousness of the legal advice would be affected if legal advice on highly sensitive subjects, as in the present case, were not protected from disclosure. This in turn would lead the Legal Service to refrain from putting its views in writing, thus depriving the Commission of an essential element in the framework of its work.

In the light of the above, I consider that the refused parts of the document are covered by the exception for the protection of legal advice provided for in Article 4(2) of Regulation (EC) No 1049/2001 and must remain confidential.

3.2. Protection of the decision-making process

Article 4(3) of Regulation (EC) No 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.*

[A]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institutions 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".

⁴ http://europa.eu/rapid/press-release_IP-18-4629_en.htm.

Disclosure of the refused parts of the document would, secondly, prejudice the Commission's internal decision making-process as provided for in Article 4(3) first subparagraph of Regulation (EC) No 1049/2001. In this respect, it must be underlined that, although the final version of the identified document has been made public by the Commission, discussions on the disembarkation options and their implementation are still ongoing as explained in point 3.1, both within the Commission and with Member States.

In this context, the analysis contained in the partially refused legal opinion and in the draft document on which the Legal Service commented will still be relevant and inform the decisions to be taken. Putting in the public domain such considerations of the Commission's services, including the legal point of view of the Legal Service, would severely reduce the Commission's capacity to take decisions after frank and unbiased internal discussions free from external interferences, thus seriously affecting its decision-making process. Therefore, the refused parts of the document are also covered by the exception provided for in Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 and cannot be disclosed by the Legal Service.

3.3. Protection of the public interest as regards international relations⁵

Thirdly, I consider that some parts of the document concerned are also covered by the exception provided for under the third indent of Article 4(1) of Regulation (EC) No 1049/2001.

Scenario 2 of the document foresees the possibility of having regional arrangements for disembarkation in third countries. As already said, the question of the "*regional disembarkation arrangements*" will be open to discussion with the interested third countries, once a common EU approach is agreed. Scenario 3 envisages the external processing of asylum applications and/or the return procedure in a third country. As indicated in the document, this scenario would require an agreement with a third country.

Some of the withheld parts of the document contain observations on the above questions which would form part of the discussions for the eventual conclusion of agreements with third countries. Disclosing the document concerned at this point in time would reveal the point of view of the Commission even before those discussions have started, thus, negatively affecting the possibility of concluding such agreements and eroding the climate of mutual trust in the negotiations. Consequently, access to those parts must be denied on the basis of the exception for the protection of the public interest as regards international relations.

3.4. Protection of personal data⁶

The names of the Commission's officials who do not form part of senior management have been deleted in the 1st page of the partially disclosed document (e-mails from DG HOME and from the Legal Service) since this information is covered by the exception provided for in Article 4 (l)(b) of Regulation (EC) No 1049/2001 ("*protection of personal*

⁵ "The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards [...] international relations, [...]"

⁶ "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".

data"), in accordance with the European Union legislation regarding the protection of personal data.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable⁷. According to Article 8(b) of Regulation (EC) No 45/2001⁸, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. Those two conditions are cumulative.

I consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

If you wish to receive the expunged personal data, I invite you to provide us with arguments showing the need to have the personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data would be disclosed.

4. OVERRIDING PUBLIC INTEREST

Please note that the exceptions under the third indent of Article 4(1)(a) ("*protection of the public interest as regards international relations*") and under Article 4(1)(b) ("*protection of personal data*") of Regulation (EC) No 1049/2001 have an absolute character and do not envisage the possibility of demonstrating the existence of an overriding public interest. As explained above, parts of the e-mails and of the document are covered by those exceptions and, therefore, there is no need to assess the existence of an overriding public interest in disclosing them.

However, pursuant to Article 4(2) and (3) of that Regulation, 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), second indent and Article (3) first subparagraph of Regulation (EC) No 1049/2001. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused parts covered by those exceptions that would outweigh the public interest in the protection of legal advice and the institution's decision making process. Besides, the Legal Service considers that the public interest in transparency has been largely satisfied by the publication of the final version of the requested document, as indicated in point 3 above.

5. 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:

⁷ Judgment of the Court of Justice of 29 June 2010, C-28/08P *Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

⁸ OJ L 8, 12.1.2001, page 1.

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

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,

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

Luis ROMERO REQUENA

Attachment: 1