



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 21.12.2018

Mrs Luisa Izuzquiza
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BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your request of 25 October 2018 registered under reference GestDem 2018/5601

Dear Mrs Izuzquiza,

I refer to your application for access to documents, under Regulation (EC) No 1049/2001¹, by which you ask for a copy of *“all documents filed by the European Commission, the European Council and the Hellenic Republic in Case T-193/16 and Joined Cases C-208/17P, C-209/17P and C-210/07P”*.

1. IDENTIFICATION OF THE DOCUMENTS

The Legal Service has identified the following documents, submitted by the Commission and the European Council in Case T-193/16, *NG v. European Council*, as matching the terms of your request:

1. Commission's request to intervene (document Ares(2016)410732).
2. Corrigendum to the Commission's request to intervene (document Ares(2016)4355994).
3. Commission's reply to the questions from the General Court (document Ares(2016)6503300).
4. Plea of inadmissibility lodged by the European Council (reference SGS16/06071).

¹ Regulation (EC) No 1049/2001¹ of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.05.2001, page 43).

Please be informed that although the Commission applied for leave to intervene in Case T-193/16 (document under number 1), it did not finally submit a Statement in Intervention. In fact, the General Court rendered an Order² dismissing the action of the applicant on the ground of the Court's lack of jurisdiction raised by the European Council.

Regarding submissions by the Hellenic Republic, please note that, according to paragraph 21 of the above referred Order of the General Court, it sought to intervene in Case T-193/96 in support of the form of sought by the European Council. However, this request to intervene has not been notified by the General Court to the Commission.

Regarding Joined Cases C-208/17P to C-210/07P³, appeals seeking the annulment of the Orders of the General Court of 28 February 2017 in Cases T-192/16, T-193/16 and T-257/16, I would like to inform you that the Commission did not intervene in those proceedings. Consequently, the Legal Service does not hold in its files any document regarding those court cases.

Article 2(2) of Regulation (EC) No 1049/2001 states that “[t]his Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and its possession, in all areas of activity of the European Union”. Since the Commission is neither in possession of the Hellenic Republic's request to intervene in Case T-193/16 nor of any document submitted in Joined Cases C-208/17P to C-210/07P, it cannot deal with this part of your request.

2. ASSESSMENT OF THE DOCUMENTS

2.1. Disclosure of the Commission's submissions

After a concrete assessment of the Commission's submissions (documents under numbers 1, 2 and 3), I am pleased to inform you that access can be granted under Regulation (EC) No 1049/2001. Please note, however, that the written signature has been deleted in document under number 2 by the reasons explained below in point 2.3.

Accordingly, you will find attached a copy of documents under numbers 1 and 3 as well as an expunged version of document under number 2. Please be informed that you may reuse the Commission's submissions free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the document. Please note that the Commission does not assume liability stemming from the reuse.

2.2. Partial refusal of the Council's submission

Regarding the Plea of Inadmissibility submitted by the European Council (document under number 4), the Commission's Legal Service has consulted its author in accordance with Article 4(4) of Regulation (EC) No 1049/2001. Following this consultation the Council has informed the Commission that parts of the document are covered by the exception provided for in Article 4 (2), second indent of Regulation (EC) No 1049/2001

² Order of the General Court of 28 February 2017 in Case T-193/16, *NG v. European Council*, ECLI:EU:T:2017:129.

³ Order of the General Court of 12 September 2018, in Joined Cases C-208/17P to C-210/17 P, *NF and Others v European Council*, ECLI:EU:C:2018:705.

(“*protection of court proceedings and legal advice*”)⁴ and, therefore, they cannot be disclosed.

The Court of Justice has recognized in its *API judgment* that where court proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of pleadings lodged with the Court would undermine those proceedings⁵. The judicial proceedings to which the requested document refer are completed. In fact, the General Court’s Order of 28 February 2017 has been confirmed by the Order of the Court of Justice of 12 September 2018 in Joined Cases C-208/17P to C-210/07P and, therefore, Case T-193/16 is definitively settled. Nonetheless, the Council indicates that the observations contained in the partially refused document relate to matters that remain particularly sensitive and wide in scope and that disclosure of the arguments put forward in those parts would have a negative impact on potential proceedings that raise similar issues. In its view, this risk is reasonably foreseeable and not purely hypothetical. It results from the foregoing that full disclosure of the requested document could affect the sound administration of justice in such proceedings by compromising the equality of arms between the parties.

Furthermore, in the Council’s view the possibility that the legal advice contained in the partially refused document be disclosed to the public could prejudice the possibility of its Legal Service to express its view free from external influences.

In view of the above, the Council considers that the refused parts of the Plea of Inadmissibility are covered by the exception provided for in Article 4(2), second indent of Regulation (EC) No 1049/2001 (“*protection of court proceedings and legal advice*”) and, thus, they cannot be made disclosed. Accordingly, you will find attached an expunged version of the Plea of Inadmissibility submitted by the European Council, where the written signature in the last page has also been blanked out for the reasons set out below in point 2.3.

Please note that partially disclosed document, submitted to the Court of Justice by the European Council, was transmitted to the Commission in its capacity as participant to the Court proceedings at stake. Access is granted for information only and it cannot be re-used without the agreement of the originator, who holds a copyright on it. It does not reflect the position of the Commission and cannot be quoted as such.

2.3. Protection of personal data

As stated above, the written signatures have been blanked out in documents 2 and 4. This information must be protected under the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 (“*protection of personal data*”)⁶ in accordance also with the European Union legislation regarding the protection of personal data, as it will be explained below.

⁴ “[T]he 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”.

⁵ Judgment of the Court of Justice of 21 September 2010 in Joined Cases *Sweden a.o v API and Commission*, C-514/07P, C-528/07P and C-532/07P, ECLI:EU:C:2010:541, paragraphs 130 and 131.

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”.

When access is requested to documents containing personal data, Regulation (EU) 2018/1725⁷ becomes fully applicable⁸. Regarding written signatures and references of the institutions' officials, the General Court has recognised in its recent judgment of 19 September 2018 that this information falls within the notion of "*private life*"⁹ regardless of whether this data is registered in the context of a professional activity. Therefore, the refused information constitutes personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

According to Article 9(1)(b) of that Regulation, 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 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.

The exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exception 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. In the present case, you have not provided elements capable of showing the existence of an overriding public interest in disclosure of the Plea of Inadmissibility submitted by the European Council that would outweigh the public interest in the protection of court proceedings and legal advice.

4. 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:

⁷ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, page 39).

⁸ Judgment of the Court of Justice of 29 June 2010 in Case C-28/08P, *Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 63.

⁹ Judgment of the General Court of 19 September 2018 in Case T-39/17, *port de Brest v Commission*, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

European Commission
Secretary-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 5/282
B-1049 Brussels

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

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,



Luis ROMERO REQUENA

Attachments: 4