



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 16th October 2019

Mr Abdul Hai
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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 August 2019, registered under reference GestDem 2019/5518

Dear Mr Hai,

I refer to your above-referenced application pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2011 regarding public access to European Parliament, Council and Commission documents¹.

Your request concerns documents “[i]n relation to what will happen to the UK Commissioner’s post as the UK has informed the EU it will not appoint one”.

The Legal Service has identified the following documents relating to the question of the UK Commissioner:

- Note of the Legal Service of 25 July 2019 to the Cabinet of President Juncker (document reference Ares(2019)6221923).
- Note to the File of the Legal Service of 10 September 2019 sent on 16 September 2019 to the Cabinet of President Juncker (document reference Ares(2019)6225274). This advice has equally been shared with the transition team of President-elect von der Leyen.

After a concrete assessment of the above documents, I regret to inform you that access cannot be granted since they must be protected in their entirety under the exceptions provided for in the second indent of Article 4(2) (“*protection of legal advice*”) and the first subparagraph of Article 4(3) (“*protection of the decision-making process*”) of Regulation (EC) No 1049/2001.

¹ Official Journal L145, 31.5.2001, page 43.

1. DECISIONAL FRAMEWORK AND ASSESSMENT

On 29 March 2017, the United Kingdom notified the European Council of its intention to leave the European Union, in accordance with Article 50 of the Treaty on European Union (TEU). Following this notification, negotiations were launched between the Government of the United Kingdom and the European Union.

On 11 January 2019, the Council of the European Union adopted a decision on the signing of the withdrawal agreement, approving also a draft decision on the conclusion of the withdrawal agreement² and forwarding that draft decision to the European Parliament for its consent.

On 15 January and 12 March 2019, the House of Commons in the United Kingdom voted against the Government's withdrawal agreement with the European Union.

Following the rejection of the withdrawal agreement, the European Council on 22 March adopted a decision for the extension of the period under Article 50. This extension was granted until 22 May 2019³.

On 29 March 2019, the House of Commons in the United Kingdom voted, for a third time, against the Government's withdrawal agreement with the European Union. On 11 April, and following the request by the Prime Minister of the United Kingdom, the European Council (Article 50), in agreement with the UK, decided on a further extension of the period provided for in Article 50 until 31 October 2019⁴.

On 16 July, Ms Ursula von der Leyen was elected by the European Parliament as President of the European Commission. However, the process for the appointment of the European Commission in accordance with Article 17 (7) TEU is still ongoing.

On 23 August 2019 the UK Government informed the Council that it would not nominate a candidate Commissioner for the new Commission as the UK will be leaving the EU on 31 October 2019.

At this stage, an agreement on the withdrawal of the United Kingdom has not yet been concluded and no decision has been taken to further extend the period provided for in Article 50.

In this context, the Legal Service is regularly invited to provide legal advice, examining the possible scenarios for Brexit and the impact these scenarios may have on the interpretation and implementation of EU law.

² Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 47I, 19.2.2019, p. 1). The text of the Withdrawal Agreement attached to Decision (EU) 2019/274 was published in OJ C 66 I, 19.2.2019, p. 1.

³ European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU (OJ L 80 I, 22.3.2019, p. 1).

⁴ European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU (OJ L 101, 11.4.2019, p. 1).

The legal considerations set out in the requested documents concern the question of the UK Commissioner in those possible scenarios and in the context of the ongoing procedure for the appointment of the next European Commission. The requested notes, which were drafted for purely internal purposes, remain extremely sensitive, considering that the issue of conclusion of the Withdrawal Agreement, which must take place before the expiry of the period set in Article 50 (3) TEU, as well as the procedure of appointment of the next European Commission, are still pending.

In light of the foregoing, disclosure of the requested documents under Regulation (EC) No 1049/2001 is not possible. Please find below an analysis of the applicable exceptions.

2. REASONS FOR REFUSAL

Protection of legal advice and of the decision-making process

Article 4(2) second indent of Regulation (EC) No 1049/2001 states by way of exception that "*[t]he 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*".

I consider that disclosure of the requested documents would, firstly, undermine the protection of legal advice, 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 advice⁵. Disclosure would make known to the public internal opinions, drafted under the responsibility of the Legal Service and intended for the Cabinet of the President of the European Commission, containing legal advice on a complex and highly sensitive issue.

Disclosure of the 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 legal advice and on the Legal Service's capacity to assist the Commission and its services in the assessment of this complex and sensitive matter. The frankness, objectivity and comprehensiveness, as well as the expeditiousness of the legal advice would be seriously affected if legal advice on highly sensitive subjects, as in the present case, would be disclosed, depriving thus the Commission of an essential element in the framework of its work.

This is particularly true when, as in this case, the advice is destined for the President of the Commission who, as member of the European Council, participates in the discussions on the possible extension of the two-year period provided for in Article 50(3) TEU for the withdrawal of the UK from the Union.

Furthermore, in accordance with Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 "*[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*".

⁵ Judgment of the Court of Justice of 1 July 2008, Joined Cases C-39/05P and C-52/05P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, ECLI:EU:C:2008:374, paragraph 42.

As already mentioned, the decision-making process regarding the withdrawal of the United Kingdom is still ongoing, affecting, also, the relevant internal decision-making processes in the EU. This conclusion must take place before the expiry set in Art. 50 (3) TEU, which may be extended by the European Council. There is therefore a close link between the requirements for such extension, and the ongoing process concerning the withdrawal agreement.

In this context, the analysis contained in the requested documents is relevant and subject of discussion for decisions to be taken by the European Council regarding the withdrawal of the UK from the Union and the appointment of the new European Commission. Putting in the public domain such considerations of the Commission's Legal Service would severely affect the capacity of the Commission President, as a Member of the European Council, to participate in the discussions in the European Council, as well as reduce the Commission's capacity to take decisions after frank and unbiased internal discussions free from external interferences.

Moreover, disclosing the documents would equally affect the capacity of the President-elect of receiving frank advice as regards the conduct of the appointment process in accordance with Article 17 (7) TEU.

In the light of the above, the refused documents must be protected under the exceptions relating to the protection of legal advice and the decision-making process and cannot be disclosed.

3. POSSIBILITY OF GRANTING PARTIAL ACCESS

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the requested documents. However, after careful examination, I have come to the conclusion that they are entirely covered by the invoked exceptions so that a partial disclosure cannot be granted without harming the protected interests

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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 processes.

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 in writing, within 15 working days upon receipt of this letter, to the Secretariat-General of the Commission at the following address:

European Commission

Secretariat-General

Transparency, Document Management & Access to Documents (SG.C.1)

BERL 7/076

B-1049 Brussels

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

Yours sincerely,



Luis ROMERO REQUENA