



European Commission  
Secretariat-General  
The Secretary-General

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Ms Rachel TANSEY

*By e-mail only:*  
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**Decision by the Secretary General within the meaning of Article 4 of the Detailed rules  
for the application of Regulation (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents pursuant to  
Regulation 1049/2001 (GESTDEM 2013/594)**

Dear Ms Tansey,

I refer to your electronic mail of 21 May 2013, registered on 24 May, by which you lodge 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> (hereafter: Regulation 1049/2001).

**1. SCOPE OF YOUR REQUEST**

In your initial application you requested access to all documents, including notes of minutes, emails and other correspondence, relating to contacts between staff of DG ECFIN and the law firm Clifford Chance (the Brussels, Paris and London offices) between February 2012 and February 2013.

The Directorate General for Economic and Financial Affairs (DG ECFIN) identified three documents as falling within the scope of your request:

1. E-mail of DG ECFIN to Clifford Chance of 8.2.2012 at 14:51;
2. E-mail from Clifford Chance to DG ECFIN of 9.2.2012 at 14:24;
3. E-mail from Clifford Chance to DG ECFIN of 16.2.2012 at 00:13.

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

<sup>2</sup> Official Journal L 145, 29.12.2001, p. 43.

These documents consist of exchanges between staff of the Commission and of Clifford Chance in the framework of a contract for legal advice provided by the latter to the Commission in the context of the management of the Greek debt and in the broader context of the different measures of financial assistance taken in favour of Greece.

DG ECFIN refused access to all three documents based on the exceptions of Article 4(1)(a), fourth indent (protection of the financial, monetary and economic policy of the Community or of a Member State) and Article 4(2), second indent (protection of [...] legal advice) of Regulation 1049/2001.

In your confirmatory application you allege that DG ECFIN did not explicitly invoke any specific exception to refuse the documents, and that its reply was therefore not valid. You demand:

*(1) that [DG ECFIN] explicitly explain which exceptions to Regulation 1049/2001 they are invoking, and*

*(2) to consider the overriding public interest in these documents (...).*

## **2. ASSESSMENT OF YOUR REQUEST 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 in light of Regulation 1049/2001.

Following this review, I regret to inform you that I have to confirm DG ECFIN's initial position not to disclose the three documents requested by you, for the reasons set out below, which are closely intertwined.

As a preliminary point, I would also like to address the issue of the validity of DG ECFIN's reply, as you call this into question in your confirmatory application.

### **2.1. Validity of DG ECFIN's initial reply**

Due to an error in the transmission of DG ECFIN's initial reply, the second page of this reply did, regretfully, not reach you. As a result, the reasoning provided by DG ECFIN for its refusal of the documents seemed to be less elaborate than intended. For instance, as you point out in your confirmatory application, that incomplete reply does not explicitly invoke a specific exception of Article 4(2) but refers instead more generally to "Article 4(2)".

However, the wording of DG ECFIN's reply, as retransmitted to you on 29 May 2013, leaves no doubt that the refusal was based on two exceptions of the Regulation, namely, Article 4(1)(a), fourth indent and Article 4(2), second indent and reasons were put forward in terms of these two exceptions.

Consequently, I consider that your first argument has been addressed by the retransmission of the complete version and has become, therefore, devoid of purpose.

## **2.2. Protection of the financial and economic policy of the European Union or a Member State**

Article 4(1)(a), fourth indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of (...) the public interest as regards (...) the financial, monetary or economic policy of the Community or a Member State*".

As indicated above, the requested documents consist of exchanges between staff of the Commission and of Clifford Chance in the framework of a contract for legal advice provided by the latter to the Commission in the context of the management of the Greek debt and in the broader context of the different measures of financial assistance taken in favour of Greece.

The contents of these documents are highly sensitive since they analyses various options in relation to issues in the context of the financial assistance to Greek.

Disclosure of these documents would clearly undermine the protection of the financial, monetary and economic policy of the Union and of Greece in the sense of Article 4(1)(a), fourth indent of Regulation 1049/2001, in two ways:

- The management of the Greek debt and the financial assistance to Greece both form part of an on-going process of confidential negotiations between the concerned Member State, the other euro area Member States, the IMF, the ECB, private lenders and the Commission. The preliminary internal assessment made by the Commission, with the assistance of Clifford Chance, on the feasibility, advantages and disadvantages of the different legal options that are available in this context is an important element for the establishment of the Commission's positions in this negotiation process. Public disclosure of this assessment and of the related exchanges with Clifford Chance would be incompatible with the need for confidentiality of the negotiations, and would thus considerably weaken the possibility for the Commission to fulfil its tasks related to the financial, monetary or economic policy of the Union and its Member States. Public disclosure would therefore clearly undermine the public interest as regards the financial and economic policy of the Union.
- Moreover, there is a real and non-hypothetical risk that public disclosure of the concerned documents would be highly detrimental to the financial situation of both the Union and Greece, and hence seriously undermine the financial, monetary or economic policy, of both the Union and Greece. Indeed, in light of the fragility of financial markets linked to the economic and financial situation of the Hellenic Republic, there is a risk that disclosure could result in adverse market reactions that would be detrimental to Greece, the Euro area and the Union. Such developments have the potential of leading to negative spill-over effects on the solvency and funding conditions of other issuers and countries in the euro area and in the Union as a whole.

I therefore conclude that the concerned documents are covered in their entirety by the abovementioned exception.

### 2.3. Protection of legal advice

Article 4(2), second indent of Regulation 1049/2001 stipulates 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.*

The documents to which you seek access concern legal advice provided by Clifford Chance to the Commission. This legal advice concerns a highly sensitive matter. Its disclosure would certainly undermine the Commission's interest in seeking legal advice and receiving frank, objective and comprehensive advice<sup>3</sup>. Indeed, in addition to the harm caused to the financial and economic policy indicated above, public disclosure of these documents would also affect the Commission's negotiation position vis-à-vis the Greek authorities on the matter concerned but also with regard to other Member States in the context of the management of their financial assistance programs. Should the Commission and its services be obliged to disclose the requested documents, it would in the future refrain from seeking legal advice on such sensitive matters.

Disclosure of the requested documents would therefore clearly undermine the Commission's possibility to seek legal advice and to receive frank, objective and comprehensive advice in the sense of Article 4(2), second indent<sup>4</sup> of the Regulation.

In your confirmatory application you contest DG ECFIN's reliance on the exception of Article 4(2), second indent, arguing that the *advice does not seem to have been in the context of a court case, so it is unclear why it must be kept secret*. However, case-law has confirmed that "legal advice" and "court proceedings" have distinct meanings, and that *legal advice drawn up in the context of court proceedings is already included in the exception relating to the protection of court proceedings, within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001*. It concluded that the exception relating to legal advice within the meaning of Article 4(2), second indent of Regulation 1049/2001 covers legal advice provided outside the context of court proceedings.<sup>5</sup> Your argument that the exception of Article 4(2), second indent is not applicable in this case as it does not relate to court proceedings can therefore not be upheld.

### 2.4. No overriding public interest

In your confirmatory application you allege that the sensitive and controversial context of the e-mail exchanges to which you seek access (i.e. *the management of the Greek debt and other financial assistance*) indicate that *there is a strong public interest in these documents*. In support of your argument, you state that *the Commission's role in designing and imposing extremely controversial fiscal measures on Greece, which have been highly contested by the Greek populous, creates a strong public interest in greater transparency about how these austerity policies were designed – including legal advice on dealing with the Greek debt – in order for EU citizens to assess the legitimacy and democratic credentials of such policies.*

<sup>3</sup> Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, ECR 2008, p. I-4723, at para. 42

<sup>4</sup> Judgment of the Court of 15 January 2013 in joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, paragraph 42.

<sup>5</sup> Judgment of the Court of First Instance (now "General Court") in Case T-84/03, *Maurizio Turco v Council of the European Union*, paragraphs 65-66.

In this regard, it must, firstly, be underlined that the exception provided for under Article 4(1)(a), fourth indent is an absolute one in that it does not have to be balanced against a possible overriding public interest in disclosure.

Secondly, even if pursuant to Article 4(2) of Regulation 1049/2001, this exception must be waived if there is an overriding public interest in disclosing the requested documents, such interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interest protected under Article 4(2), second indent.

However, I consider that in this case, given the important public interests at stake and the sensitive nature of the matters to which the documents refer, the possible public interest transparency does not outweigh the interest in protecting the legal advice concerned for the reasons set out above. In this regard, I refer to *Turco* judgment, in which the Court of Justice has acknowledged that even a legal opinion given in the context of legislative activities, may be protected on the basis of its particularly sensitive nature<sup>6</sup>. The protection is *a fortiori* justified in this case since the documents requested do not concern legislative activities but activities of the Commission<sup>7</sup> with regard to the management of the Union's economic and financial affairs.

Finally, I should also like to point out that the applicable exception of Article 4(2), second indent (protection of legal advice) is in this case closely intertwined with the exception of Article 4(1)(a), fourth indent (protection of the financial and economic policy of the Union and its Member States).

For the reasons set out above, I have to conclude that DG ECFIN's refusal to disclose the documents has to be confirmed.

## **2.5. No partial access**

I have also examined the possibility of granting partial access in the sense of Article 4(6) of Regulation 1049/2001. However, the documents to which you seek access are entirely covered by the exceptions of Article 4(1)(a), fourth indent and 4(2), second indent.

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<sup>6</sup> Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v. Council*, paragraph 69.

<sup>7</sup> See Cases C-139/07 P, *Commission v. Technische Glaswerke Ilmenau*, at paragraph 60; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *API*, at paragraph 77.

### **3. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Catherine Day', with a stylized, flowing script.

Catherine Day