



EUROPEAN COMMISSION

Brussels, 5.6.2019
C(2019) 4305 final

████████████████████
████████████████
12300 Bouillac
France

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/1280**

Dear ██████████,

I refer to your letter of 28 March 2019, registered on the same day, in which you made numerous representations concerning your case concerning alleged violation of EU law in the Republic of Cyprus. In the same communication, you also submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 28 February 2019, addressed to the Directorate-General for Justice and Consumers, you requested access to 'copies of the Republic of Cyprus' replies' in the context of complaint procedure no. CHAP(2018)983 and information in relation to the European Commission's reactions to the alleged unfair commercial practices and contract terms in Cyprus in connection with immovable properties.

The European Commission has identified the following documents as falling under the scope of your request:

- Email from the Cypriot authorities to Directorate-General for Justice and Consumers, dated 1 February 2019, reference Ares(2019)873475 (hereafter 'document 1'); and

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

- Email from the Cypriot authorities to Directorate-General for Justice and Consumers, dated 7 February 2019, reference Ares(2019)873475 (hereafter 'document 2'). Document 1 and 2 are hereafter together: 'requested documents'.

In its initial reply of 20 March 2019, Directorate-General for Justice and Consumers refused access to the requested documents based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. In your confirmatory application, you request a review of this position. This decision provides a final reply to your request for access to the concerned documents under Regulation (EC) No 1049/2001.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

As regards the requested documents, I regret to inform you that I have to confirm the initial decision of Directorate-General for Justice and Consumers to refuse access, based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Consultation of the Member State

As the non-disclosed requested documents originated from the Cypriot authorities, the European Commission consulted the Cypriot authorities under Article 4(4) and (5) of Regulation (EC) No 1049/2001 with a view to assessing whether the exception in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 is applicable. According to the Cypriot authorities, access to the requested documents should be withheld based on the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. They also confirmed that administrative procedures were currently ongoing before the national authorities against entities that are related to your above-mentioned complaint submitted to the European Commission.

2.2. Protection of the purpose of inspections, investigations and audits

The Court of Justice established that, ‘the Commission was entitled to consider, in general terms, that full disclosure of the [documents] which, when the express decision was adopted, *had already been placed in a file relating to the pre-litigation stage* of infringement proceedings opened with the sending of a letter of formal notice [...], would have undermined the protection of that purpose [meaning the purpose pursued by the European Commission’s investigations in the sense of the third indent of Article 4(2) of Regulation (EC) No 1049/2001]’³ (emphasis added).

The Court of Justice confirmed the key importance of the fact of whether or not the document in question has been placed into the file of the administrative procedure (such as the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union): ‘[...] the Court considered that the fact that documents had been placed in the file of an administrative procedure was decisive for concluding that those documents related to that procedure’.⁴

I have to point out that the requested documents currently form part of the file of an infringement procedure against Cyprus (case no. 2013/2082), which is still ongoing and whose subject-matter covers that of your earlier complaint file under CHAP(2018)983.

Therefore, the requested documents fall, in line with the settled case-law of the Court of Justice, under the general presumption according to which ‘[...] it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.’⁵

Accordingly, ‘[...] the Member States are entitled to expect the European Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice.

³ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Commission*, C-612/13 P, EU:C:2015:486, paragraph 76.

⁴ Judgment of the General Court of 4 October 2018, *Daimler AG v European Commission*, T-128/14, EU:T:2018:643, paragraph 166.

⁵ Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 65.

The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access [...] on the ground of protection of the public interest relating to inspections, investigations and court proceedings [...]⁶

Finally, the Court of Justice specified that this general presumption covered all documents relating to the infringement procedure under Article 258 Treaty on the Functioning of the European Union: ‘[c]onsequently, [...] all the documents, irrespective of whether they had been drawn up during the informal stage of that procedure, that is to say *before* the Commission sent the letter of formal notice to the Member State concerned, or during the formal stage thereof, that is to say *after* that letter was sent, were regarded as being covered by that presumption’ (emphasis added).⁷

Therefore, the disclosure of the requested documents at this stage of the infringement case would essentially deprive the Cypriot authorities from their lawful expectation of sincere cooperation on the part of the European Commission during infringement procedure no. 2013/2082. Refusal of access to the requested documents is therefore justified under the third indent of Article 4(2) Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

The General Court acknowledged that ‘the individual interest which may be asserted by a requesting party in obtaining access to documents concerning him personally cannot generally be decisive for the purposes both of the assessment of the existence of an overriding public interest and of the weighing up of interests under [...] Article 4(2) of Regulation No 1049/2001’⁸

Nor have I been able to identify any further public interest capable of overriding the interests protected by the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

⁶ Judgment of the Court of First Instance of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

⁷ Ibid, paragraph 41.

⁸ Judgment of the General Court of 26 May 2016, *International Management Group v European Commission*, T-110/15, EU:T:2016:322, paragraph 56.

However, as stated by the Court of Justice, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part.⁹

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General

⁹ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.