



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, 23.05.2014
SG.B.4/LR/rc - sg.dsg2.b.4(2014) 1264788

Mr Erik Wesselius
Corporate Europe Observatory

**By e-mail only: ask+request-1174-
92542987@asktheeu.org**

**Subject: Confirmatory application for access to documents under Regulation (EC)
No 1049/2001 - GESTDEM 2014/630**

Dear Mr Wesselius,

I refer to your e-mail of 18 March 2014, registered on 19 March 2014, in which you make a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 4 February 2014, you requested access to the *legal opinion of the European Commission's Legal Service that was used in the discussions in the High Level Working Group on the review of the Transparency Register that took place in July-December 2013.*

In its initial reply of 24 February 2014, the Legal Service identified the following document as falling under the scope of your request:

Mandatory register for lobbyists: legal basis; Ares(2013)3191712 which was drawn up by the European Commission's Legal Service following a request of the cabinet of the Vice-President in charge of the inter-institutional relations on the issue for the establishment of a potential mandatory register of lobbyists.

¹ Official Journal L145, 31.05.2001, p. 43.

The Legal Service granted partial access, refusing the redacted parts on the grounds of Article 4(2) second indent (protection of legal advice) and Article 4(3) second paragraph (protection of the decision-making process) of Regulation 1049/2001.

In your confirmatory application you ask for a review of this position. You support your request with detailed arguments, which I will address in the corresponding sections hereafter.

2. EXAMINATION AND CONCLUSIONS UNDER REGULATION 1049/2001

Having carried out a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I regret to inform you that the refusal of the Legal Service has to be confirmed for the reasons set out below.

3. PROTECTION OF LEGAL SERVICE AND THE DECISION-MAKING PROCESS

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

Article 4(3), second paragraph, of Regulation 1049/2001 provides that *[a]ccess to a document containing opinion for internal use as part of deliberations and preliminary consultations within the institution 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 in disclosure.*

The document to which you request access was drawn up in the framework of the review of the Transparency Register, as provided for in the Inter-Institutional Agreement between the European Parliament and the European Commission². Following negotiations and discussions among the members of the working group, several policy options were considered – in particular regarding the mandatory or non-mandatory nature of the register. Therefore, legal advice was sought in order to contribute to the decision-making process. The outcome of the review has since been formally approved by the plenary of the European Parliament and by the Commission.

² Official Journal L191, 22.07.2011, Final Provisions, p. 32.

However, on the mandatory nature of the Register, the Commission expects to review the issue in 2017, as enshrined in the inter-institutional agreement.

Under these circumstances, considering the broad scope of the legal advice in question, the Commission's *interest in seeking legal advice and receiving frank, objective and comprehensive advice*³ in the sense of Article 4(2), second indent of Regulation 1049/2001 would be undermined by disclosure of the document.

A new review is envisaged for 2017 – and several technical issues remain to be agreed upon. Under those circumstances, release of the document could undermine the ability of the institutions to take future decisions on the future nature of the Transparency Register.

Given that the topic at stake was highly debated and sensitive, the members of the working group dedicated extensive efforts to reaching a consensus. Disclosure of the legal advice would make available to the public the points and interpretations that were the subject of discussion during these difficult negotiations and in consequence, affect the way in which the decision-making process is conducted.

On the basis of the above, access to the requested document has to be refused on the grounds of Article 4(3), second subparagraph, of Regulation 1049/2001.

4. OVERRIDING PUBLIC INTEREST

The exceptions to the right of access provided for in Article 4(2) and (3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosing the document concerned. For such an interest to exist, firstly, it has to be a public interest and, secondly, it has to outweigh the interest protected by the exception to the right of access.

In your confirmatory request you claim that "*... in the light of the longstanding debate about the legal basis for mandatory registration of EU lobbyists, we consider it of overriding public interest that the expunged parts of the legal note are being disclosed*".

I acknowledge that the debate to which you refer has had an important interest insofar as the citizens have the right to know who is trying to influence European public policies and the tools to control them. However, I have not been able to identify the ways in which disclosure of the requested document at this stage would clarify the debate, given that different opinions and approaches are likely to continue existing with regard to the topic.

I would like to underline in this respect that the document contains the opinions and advice of the Commission's legal service but it does not represent the view of the

³ See judgment of the Court of Justice of 1 July 2008 in Joined Cases C-39/05P and C52/05P *Kingdom of Sweden and Maurizio Turco v Council of the European Union* (paragraph 42), ECR [2008] I-04723.

Commission as a party to the working group. As explained above, its disclosure would hinder the ways in which the institution freely and without pressure takes its decisions.

Therefore, while I recognise the importance of transparency in enabling citizens to participate in the democratic process, the interest of the Commission and its services to receive frank, objective and comprehensive legal advice and the need to protect that institution's decision-making process and its right of defence are not outweighed by the public interest in transparency in this case.

For the reasons set out above, I therefore have to conclude that the Legal Service's refusal to the undisclosed parts of the documents to which you seek access has to be maintained.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 of the Treaty on the Functioning of the EU (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 large checkmark-like flourish at the end.

Catherine Day