



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 27. 07. 2016

Ms Darbshire
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BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your application of 19 May 2016 registered under reference GestDem 2016/2791

Dear Ms Darbshire,

I refer to your request mentioned above for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹. Your request concerns the *"legal advice generated by and/or provided to the Commission regarding the lobby register, including any and all legal advice that considers the treaty basis for the register and whether or not it could be mandatory"*.

The following documents have been identified as fulfilling the criteria of your request:

1. Note of the Legal Service to the Secretary General of 12 September 2006 (reference JUR(2006)30417).
2. Note of the Legal Service to the Secretariat General of 17 September 2007 (reference JUR(2007)30478).
3. Note of the Legal Service to the Head of Cabinet of Vice-President Maroš Šefčovič of 2 October 2013 (reference Ares(2013)3191712).

After a concrete assessment of the concerned documents, I have come to the conclusion that partial access can be granted to all documents. As regards the withheld parts, I regret to inform you that they are covered by three of the exceptions provided for in Regulation

¹ OJ L 145, 31.05.2001, page 43.

(EC) No 1049/2001. More precisely, the expunged parts are covered by the exceptions provided for in Article 4(2) second indent ("*protection of legal advice*"), in Article 4(3) first paragraph ("*protection of the decision-making process*") and in Article 4(1)(b) ("*protection of personal data*").

1. ASSESSMENT

i. Protection of legal advice and of the decision-making process

According to Regulation (EC) No 1049/2001, article 4(2) second indent: "*The 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*".

Also, according to article 4(3) first paragraph of that Regulation: "*Access 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*".

The notes of the Legal Service of 12 September 2006 and of 2 October 2013 concern the common register of lobbyists, referring more particularly to the possibility of rendering this registration mandatory and to a possible legal basis of this obligation. More specifically, the legal opinion of 2 October 2013, which was drafted following a request made by the cabinet of the Vice-President in charge of the interinstitutional relations, is of a particularly large scope. Indeed, Articles 298 and 352 of the Treaty on the Functioning of the European Union ("TFEU") are examined with a view to determining a possible legal basis to be given to eventual mandatory rules for registration of lobbyist and, at the same time, a detailed interpretation of the above mentioned articles is presented by the Legal Service. The legal basis for rendering the registration for lobbyists mandatory is indeed a sensitive subject, for which no decision has been officially taken by the Commission. Therefore, this legal opinion is not only relevant in the context of the lobby register, but may also be relevant and subject of discussion in the framework of future questions where the interpretation of the concerned Articles of TFEU would arise.

With regard to the note of the Legal Service to the Secretary General of 17 September 2007, its purpose is to examine the possible sanctions under the Code of Conduct. The Code of Conduct, as provided for in Annex III of the 2014 Interinstitutional Agreement, establishes the standards of behaviour which must be respected by all interest representatives in their relations with the EU institutions². Annex IV of the same agreement refers to the procedures for alerts and for the investigation and treatment of complaints, providing also for the sanctions in cases of non-compliance with the Code of Conduct. In view of the pending discussion on the future proposal for a compulsory transparency register, the sanctions are also to be reconsidered and could be modified.

Disclosure of the withheld parts would, firstly, undermine the protection of legal advice provided for under Article 4(2), second indent, of Regulation No 1049/2001 which, as recognised by the Court of Justice, must be construed as aiming to protect an institution's

² [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0919\(01\)&from=en](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0919(01)&from=en)

interest in seeking legal advice and receiving frank, objective and comprehensive advice³. Indeed, full disclosure of the documents would make known to the public an internal legal opinion in a matter of a sensitive nature, drafted under the responsibility of the Legal Service and intended exclusively for the Commission's Cabinet responsible for the matter and for the Secretariat-General. As set out above, the legal analysis and opinions expressed in the requested documents are still relevant today and likely to become subject of discussion in the forthcoming discussions on the possibility of rendering the transparency register mandatory. Accordingly, full disclosure of the above documents and of the positions expressed in them would prejudice the Legal Service's capacity to assist the Commission, depriving thus the College of an essential element in the process of taking sound decisions.

Secondly, disclosure of the withheld parts would also prejudice the Commission's internal decision-making process. Putting in the public domain the legal considerations of the Commission's services, including the legal point of view of the Legal Service, before the College of Commissioners has taken a position on this sensitive matter, would severely reduce the Commission's capacity to take a decision after frank and unbiased internal discussion, free from external interferences, affecting, thus, seriously its decision-making process. Therefore, the refused parts of the legal opinions are also covered by the exception provided for in Article 4(3) first paragraph ("*protection of the decision-making process*") of Regulation No 1049/2001.

Under these circumstances, full disclosure of the requested documents at this stage is not possible. Accordingly, please find enclosed a copy the concerned documents in their expunged version.

ii. Protection of personal data

According to Article 4(1)(b) of Regulation (EC) No 1049/2001: "*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 (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁴ becomes fully applicable⁵. In accordance with the exception regarding the protection of personal data, the names, initials of the names, work addresses, telephone numbers and e-mail addresses of the staff members not having the function of senior management staff at the Commission, as well as the handwritten signatures have been removed from the requested documents.

³ Judgment of 1 July 2008 in *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42.

⁴ OJ L 8, 12.1.2001, p. 1.

⁵ Judgment in *European Commission v The Bavarian Lager Co. Ltd.*, C-28/08 P, EU:C:2010:378.

According to Article 8(b) of this 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. Accordingly, the requested documents are disclosed expunged from personal data.

If you wish to receive the expunged 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.

Please note that the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

2. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) and 4(3) first paragraph 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 documents. 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 under Article 4(3) first paragraph. The transparency register is indeed an initiative of public interest, as it aims at reinforcing the openness and accountability of the EU institutions towards citizens and organisations representing particular interests at EU level. However, in the present case, given the forthcoming discussions on the subject, I see no elements capable of showing the existence of an overriding public interest in disclosure of the withheld parts of the documents that would outweigh the public interest in the protection of legal advice and of the decision-making process.

3. REUSE

You may reuse the documents disclosed to you 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 documents. Please note that the Commission does not assume liability stemming from the reuse.

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 address below.

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Bruxelles

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,

A handwritten signature in blue ink, appearing to read 'Luis Romero Requena', with a large initial 'L' and a stylized 'R'.

Luis ROMERO REQUENA

Attachments: 3