



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 30. 07. 2013

By e-mail

Mr. Aris Kolimatsis
ask+request-593-daadaaa2@asktheeu.org

Subject: Request for access to documents

Ref.: Your e-mail of 25 June 2013, registered as GestDem 2013/3524

Dear Mr. Kolimatsis,

I refer to your e-mail mentioned above addressed to Directorate General for Research and Innovation (DG RTD) requesting access to documents under Regulation (EC) N° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹.

Points 2, 4, 6, 8, 12 and 16 of your application refer to documents under the responsibility of the Legal Service. Therefore, as you were informed, this part of your request has been transferred to the Legal Service on 3 July 2013 and registered under reference number GestDem 2013/3524.

After examination of the Legal Service's files, the following documents have been identified as falling within the scope of your request:

- **Point 4 of your request – Commission Decision C(2007)1509/1 – adoption of the model grant agreement**
 1. Note reference JUR(2007)15145 of 12 March 2007. This note is the reply to the interservice consultation launched by DG RTD in view of the adoption of the Commission Decision C(2007)1509/1.
- **Point 8 of your request – Analysis and reasoning about article 30 "liquidated damages" of Annex II of the FP6 model contract, especially the formula of the first paragraph.**
 2. Note reference JUR(2008)15423 of 10 July 2008. Only point 3 of this note concerns the question of the liquidated damages referred to in the first paragraph of Article 30 an Annex II to the FP6 Model Contract. Therefore, only this part has been considered for your request.

¹ OJ L 145, 31.05.2001, page 43.

– **Points 2, 6, 12 and 16**

The Legal Service has not identified any document which corresponds to the terms of these points of your request.

Having carefully examined the identified documents, I am pleased to inform you that full access can be granted to document reference JUR(2007)15145, a copy of which you will find enclosed. I must however remind you that this document cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.

As regards point 3 of document reference JUR(2008)15423, I regret to inform you that it cannot be disclosed since it is covered by the exceptions provided for in Article 4(2) second indent ("*the protection of legal advice*")² and Article 4(3) second paragraph ("*the protection of the decision-making process*")³ of Regulation 1049/2001.

At the outset, it should be made clear that this legal opinion does not relate to a legislative activity. Indeed, point 3 of this legal opinion relates to draft Guidelines drawn up by DG RTD for the application of the liquidated damages clause in FP6 Contracts and FP7 Grant Agreements (GAs) in order to assure that a unified approach for their implementation is adopted by the Commission's services (hereinafter "*Guidelines*"). The withheld part of the legal opinion contains an assessment of the above referred clause and the proportionality of the liquidated damages resulting from the application of the formula foreseen at the General Conditions of the Model Contract for FP6 and to the Model Grant Agreement for FP7.

I consider that disclosure of the refused part of the legal opinion would, firstly, undermine the protection of legal advice provided for under Article 4(2) second indent of Regulation 1049/2001, 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 advice⁴.

Indeed, as stated above, this legal opinion has been drafted by the Legal Service for purely internal purposes within the Commission and intended for the Commission's services responsible for the implementation of liquidated damages. Although the above mentioned "*Guidelines*" were adopted in 2008⁵, the issues analysed in the refused part of this legal opinion are still relevant today and regularly subject of discussion when applying liquidated damages to FP6 and FP7 contracts in individual cases of unjustified financial EU contributions.

² "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".

³ "Access to a document containing opinions 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".

⁴ C-39/05 P and C-52/05 P Kingdom of Sweden and Maurizio Turco v Council of the European Union, [2008] ECR p. I-4723, at para. 42.

⁵ A copy of the last version of this document, which has already been disclosed to the public under Regulation 1049/2001, is attached to the present reply.

In these circumstances, disclosure of the withheld part of the legal opinion would have adverse consequences both for the Legal Service's capacity to assist the Commission and its services in the matter concerned without being confronted with its previous positions on the same matter and for the Commission to seek legal advice and receive frank, objective and comprehensive advice. Furthermore, its disclosure would undermine the Commission's services capacity to implement liquidated damages to FP6 and FP7 contracts in cases of unjustified financial EU contribution in an objective and independent manner ensuring equal treatment of all beneficiaries (free from external influences). Therefore, the concerned documents are also covered by the exception provided for in Article 4(3) second paragraph ("*the protection of the decision-making process*") of Regulation 1049/2001.

In addition, disclosure of point 3 of the legal opinion at issue would also impact the Commission's position in disputes before the Court of Justice relating to the liquidated damages, including its rights of defence. This risk is not hypothetical, but a real and concrete one.

In the light of the foregoing, I consider that point 3 of legal opinion reference JUR(2008)15423 must remain confidential.

Pursuant to Article 4(2) and (3) of Regulation 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. I understand the interest of transparency in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. However, in the present case, for the reasons explained above, I consider that the interest in transparency does not outweigh the public 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, as well as its rights of defence.

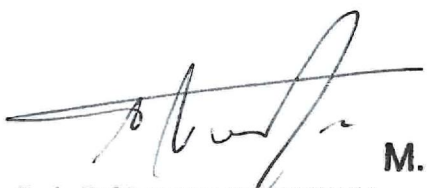
If you should wish this position to be reconsidered, please submit in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the address below.

The Secretary-General will inform you of the result of such review within 15 working days from the date of registration of your request. You will either be given access to the document or your request will be rejected, in which case you will be informed of what further action is open to you.

All correspondence should be sent to the following address:

The Secretary-General
European Commission
B-1049 BRUSSELS
e-mail: Sg-Acc-Doc@ec.europa.eu

Yours sincerely,


r/c Luis ROMERO REQUENA, *absent* M. TH VAN RIJN

Enclosures: 1. JUR(2007)15145
2. "Guidelines"