



EUROPEAN COMMISSION

LEGAL SERVICE
The Director-General

Brussels, 24th June 2021

By e-mail

Mrs Luisa Izuzquiza
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Subject: Request for access to documents

Ref.: Your request of 6 April 2021 registered under reference GestDem 2021/2092

Dear Mrs Izuzquiza,

I refer to your above-referenced application, under Regulation (EC) No 1049/2001¹, by which you request access to documents in the following terms:

“1. All documents generated or received by the Legal Service containing legal advice and/or an analysis of the legality of the so-called “Multi-Purpose Reception and Identification Centres” or MPRIC in Greece, as well as ‘3 smaller reception centres on the islands of Samos, Kos and Leros’.

Please note that a (non-exclusive) example of the documents I am interested in, and that would fall under the scope of my request, would be those containing a legal analysis and/or providing legal advice with regards to the European Commission’s Memorandum of Understanding on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesvos.

2. I am also requesting, with regards to the article published by EU Observer on 21 April 2020 mentioning an “internal note from the EC's legal service ... drafted and shared with president Ursula von der Leyen shortly after Greece imposed the restrictions. Dated 4 March, the note contains a preliminary analysis of the national measures taken by the Greek government.”

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.05.2001, page 43).

After examination of the files of the Legal Service, the following documents have been identified as matching the terms of your request:

Documents matching the 1st point of the request

1. email of 6 October 2020 from the Legal Service to Directorate General for Migration and Home Affairs (DG HOME) with title “*MoU Pilot Lesbos-consolidated draft (6/10)*”. Attached to the email is a draft version of the Memorandum of Understanding² (MoU) with the Legal Service’s comments (document reference Ares(2021)2608442).
2. email of 14 October 2020 from the Legal Service to DG HOME with title “*MoU Pilot Lesbos-consolidated draft (6/10)*”. Attached to the email is a draft version of the MoU with the Legal Service’s comments (document reference Ares(2021)2608714).
3. email of 21 October 2020 from the Legal Service to DG HOME with title “*new version MoU Lesvos – targeted change to check with LS*”. Attached to the email is a draft version of the MoU (document reference Ares(2021)260884).

Document matching the 2nd point of the request

4. Note of the Legal Service of 4 March 2020 to a member of the President’s cabinet with title “*Preliminary analysis of the national measures*” (document reference Ares(2020)1726642).

1. CONTEXT OF THE DOCUMENTS REQUESTED AND ASSESSMENT

Documents 1 to 3 are internal legal advice given by the Legal Service to DG HOME in the framework of the preparation of the Memorandum of Understanding between the European Commission, the Greek authorities and the EU Agencies to establish a new reception and identification center on the island of Lesbos by early September 2021. As stated above, attached to the emails are the successive versions of the MoU containing the comments of the Legal Service. These documents were drafted in view of the discussions on the matter among the Commission’s services and, at the highest level, with the Cabinet of the President and the Cabinet of the Commissioner for Home Affairs. The MoU was approved by the Commission on 2 December 2020 and it has been made publicly available³.

Document 4 is a legal opinion drafted by the Legal Service and intended for the President of the Commission. This opinion is of an internal preliminary nature and contains a preliminary analysis of the national measures taken by the Greek Government concerning people illegally entering the national territory and wishing to apply for international protection, and this in the light of primary law and secondary law of the European Union.

After a concrete assessment of the documents requested, I regret to inform you that they cannot be disclosed since they must be protected in accordance with the exceptions laid down in Article 4(2), second indent (“*protection of legal advice*”), second paragraph of Article 4(2) (“*protection of the decision-making process*”) and Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 (“*protection of international relations*”), as explained below.

² Memorandum of Understanding between the European Commission, European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of Hellenic Republic, of the other part, on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesbos (C(2020)8657).

³ https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2284

2. REASONS FOR REFUSAL OF THE LEGAL OPINIONS

2.1 *Protection of legal advice*

At the outset, it should be noted that the three emails sent by the Legal Service to DG HOME, the Legal Service's comments in the successive versions of the MoU as attached to these emails as well as document Ares(2020)1726642 are legal opinions in the sense of Article 4(2), second indent, of Regulation (EC) No 1049/2001. In this respect, the General Court has recognized in its judgment in Case T-755/14 that *“the concept of “legal advice” relates to the content of a document and not to its author or its addressees. [...] this is a question of advice relating to a legal issue, regardless of the way in which that advice is given. [...]it is irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing that advice was provided at an early, late or final stage of the decision-making process. In the same way, the fact of the advice having been given in a formal or informal context has no effect on the interpretation of that concept”*⁴.

Those documents are covered by the exception laid down in Article 4(2), second indent, of Regulation (EC) No 1049/2001⁵, which as recognized 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 advice⁶.

Disclosure of the legal opinions contained in documents 1 to 3 would make known legal advice provided on drafts and early versions of a future document, *i.e.* the MoU, relating to a matter of high sensitive nature, namely how the Commission and four other Union agencies on the one hand, and the Greek government on the other hand, should best cooperate on the establishment of a new Multi-Purpose Reception and identification Centre in Lesbos. Moreover, not only is the political context of surrounding the situation of asylum seekers in Lesbos a highly difficult and emotional one, both on the ground and for political debate on migration throughout Europe. More importantly, the legal issues treated in the legal advice provided in documents 1 to 3 are themselves highly sensitive. The legal advice given explored how a very specific, innovative construction of a Joint Pilot between the EU side and the Greek side, deemed necessary in the special political context mentioned above, can legally be accommodated in full compliance with overarching principles of EU institutional and budgetary law. Sensitive and novel legal questions on the delimitation of direct, indirect and shared management, on the Commission's possibilities of support, control and coordination with other EU agencies, of the appropriate mode of internal coordination within the EU side and on the respective roles of the Commission and the Greek government in cooperating in this setting were treated by the Legal Service.

Disclosure of document 4 would put in the public domain internal opinions drafted under the responsibility of the Legal Service and intended for the President of the Commission in order to inform her of an extremely critical situation in progress, where a Member State, relying on its right to protect its national security and sovereignty, has been taking temporary measures faced with high number of attempts of illegal crossing of the Union's external borders. As already stated, this preliminary legal opinion analyses a very delicate situation, from the point of view both of the protection of the Union's external borders and of the efficient functioning of the Common European Asylum System.

⁴ Judgment of the General Court of 15 September 2016, Case T-755/14, *Herbert Smith Freehills LLP v Commission*, ECLI:EU:T:2016:482, paragraphs 47-53.

⁵ “[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”.

⁶ Judgment of the Court of Justice of 1 July 2008, Joined Cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, ECLI:EU:C:2008:374, paragraph 42.

It is also intimately linked to certain aspects of the discussions in the framework of the “New Pact on Asylum and Migration” presented by the Commission on 23 September 2020, and in particular discussions on the proposal for a regulation addressing situations of crisis and force majeure in the field of migration and asylum (COM(2020) 613 final).

Disclosure of the documents requested would clearly have, in a foreseeable manner, a serious impact on the Commission's interest in seeking and receiving legal advice and on the Legal Service's and other services' capacity to assist the Commission in the assessment of sensitive legal questions, both as regards budgetary and institutional law and as regards migration and asylum law including the respect of fundamental rights. The frankness, objectivity and comprehensiveness as well as the expeditiousness of the legal advice would be seriously affected if legal advice on highly sensitive subjects, as in the present case, would be disclosed, depriving thus the Commission of an essential element in the framework of its work.

On the basis of the above, I conclude that the documents requested must be protected under the exception relating to the protection of legal advice foreseen in Article 4(2), second indent of Regulation (EC) No 1049/2001 and cannot be disclosed.

2.2 Protection of the decision-making process

Documents 1 to 3, including the successive versions of the MoU attached to them, are also covered by the exception laid down in Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001 which states that “[a]ccess 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”.

As already detailed above, documents 1 to 3 contain legal comments of a sensitive character on drafts and early versions of a future document *i.e.* the MoU. They were intended for internal use and were an important part of deliberations and preliminary consultations prior to the approval of the MoU by the Commission on 2 December 2020. Moreover, the implementation of the MoU of 2 December 2020 is a complex ongoing process regularly presenting delicate issues on which the Commission is required to take a stance often linked with the previous given advice. Disclosure of documents 1 to 3, containing sensitive legal advice and drafts and early versions of the future MoU, would be negatively affecting the public interest in the protection of the institution's decision-making process since it would deter the Commission's services and, more particularly, the Legal Service from making legal comments independently and without being unduly influenced by the prospect of public disclosure. It would also affect the Commission's margin of manoeuvre in taking positions in the ongoing process of implementing the MoU in cooperation with EU agencies and the Greek side. All this would severely reduce the Commission's capacity to take decisions after frank and unbiased internal discussions free from external interferences, thus depriving it of essential elements in the process of adopting its final positions on the sensitive issues at stake in the establishment and subsequent implementation of the MoU on a Joint Pilot for the new Centre in Lesbos.

Consequently, I conclude that documents 1 to 3 also covered by the exception provided for in Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001 and cannot be disclosed by the Legal Service.

2.3 Protection of international relations

Furthermore, document number 4 is covered by the exception provided for in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 which states that “[t]he institutions shall refuse access to a document where disclosure would undermine the public interest as regards the protection of international relations”.

As far as the protection of international relations are concerned, the EU Courts have acknowledged that the institutions enjoy a wide discretion when considering whether access to a document may undermine that public interest⁷.

It is noted that the situation at the Greek borders, which is the subject of the legal advice in question, also caused significant tension with Turkey. In that respect, the document requested was provided to the Cabinet of President Ursula von der Leyen before her Brussels meeting of 9 March 2020 with President Charles Michel and President Recep Tayyip Erdoğan.

Its disclosure would reveal a preliminary analysis of highly sensitive legal issues concerning the situation at the Greek borders, which remains directly relevant for the ongoing implementation of the EU-Turkey statement on migration, security and stability in the region and the current international cooperation as regards asylum seekers and migrants.

In view of the foregoing, I conclude that document 4 must be protected under the exception related to the protection of the public interest as regards international relations.

In fact, it is of the utmost importance that it remains confidential.

3. POSSIBILITY OF GRANTING PARTIAL ACCESS

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the requested documents. However, after careful examination, I have come to the conclusion that they are entirely covered by the invoked exceptions so that a partial disclosure cannot be granted without harming the protected interests.

4. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(2), second indent, of Regulation (EC) No 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. In order for such an overriding public interest to exist, this interest, firstly, has to be public and, secondly, overriding, *i.e.* in the present case it must outweigh the interests protected under Article 4(2), second indent, and Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001.

In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure that would outweigh the public interest in the protection of legal advice on the highly sensitive issue of the invocation by the Greek Government of sovereignty and national security, in a context of an acute crisis situation (with regards to document 4) and also of legal advice on highly sensitive matters of budgetary and institutional law as regards the Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre and the need to protect the institution’s decision-making process in that respect (with regard to documents 1 to 3). Besides, in the case of documents 1 to 3, I consider that the public interest in transparency has been largely satisfied by the publication of the Memorandum of Understanding by the Commission, as indicated above.

⁷ Judgment of the Court of First Instance of 25 April 2017, T-264/04, *WWF European Policy Programme v Council*, ECLI:EU:T:2007:114, paragraph 40.

Please note that the exception under Article 4(1)(a), third indent ("*protection of the public interest as regards international relations*") has an absolute character and must not be balanced against an overriding public interest.

5. MEANS OF REDRESS

Should you wish this to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretariat-General at the address below:

European Commission
Secretariat-General
Unit C.1. 'Transparency, Document Management and Access to Documents'
BERL 7/076
B-1049 Brussels
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[*signed electronically*]
Daniel CALLEJA CRESPO