EUROPEAN COMMISSION

LEGAL SERVICE
The Director-General

Brussels, 17.02.2012

By e-mail

Subject: Request for access to documents

Ref.: Your e-mail of 4 January 2012, registered on 5 January, as GESTDEM 2012/0059

Dear [Redacted]


After examination of the Legal Service's files, the legal opinion reference Ares(2010)828204 has been identified as falling within the scope of your request. This legal opinion was delivered by the Commission's Legal Service in response to a consultation by Directorate-General Home Affairs (DG HOME) in the context of a future revision of the Data Retention Directive.

Having carefully examined the concerned document, 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") and Article 4(3) first paragraph ("the protection of the decision-making process") of Regulation 1049/2001. In fact, according to article 4(6) of this Regulation only the subject, reference and the first sentence of the introductory paragraph could be disclosed. However, since these parts do not have any substantial content, I assume that an expunged version of this document would not interest you. Should you like to receive it nevertheless, please let me know.

3 "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".
4 "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".

At the outset, it should be underlined that this legal opinion has not been rendered in the framework of a legislative activity. Indeed, as pointed out above, the requested legal opinion was delivered by the Legal Service in the context of the Commission's internal discussions on a possible revision of the Data Retention Directive. This legal opinion analyses the issues of the possibility to render the application of the Data Retention Directive optional to Member States (MS) and the consequences of such a different treatment between MS as well as the question of the legal basis on which future instruments on data retention should be adopted.

In this respect, it must be stressed that the question of the data retention is of a highly sensitive nature since it might have an impact on the rights to privacy and the protection of personal data.

It must also be observed that this legal opinion was issued for internal use as part of deliberations and preliminary consultations within the Commission in view of an eventual revision of the Data Retention Directive and for which a decision of the College has not yet been taken. Therefore, the legal issues discussed in it are still and would be in the future subject of discussion by the College in the context of the adoption of a proposal for the revised Data Retention Directive.

Disclosure of this legal opinion would, firstly, undermine the protection of legal advice provided for under Article 4(2) second indent of Regulation 1049/2001 since it would make known to the public an internal opinion intended for the Commission's service responsible for preparing the proposals for such a revision. In fact, its disclosure would clearly have a serious impact on the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice on this sensitive matter and in general.

Secondly, disclosure would also have a very negative impact on the institution's decision-making-process, including the Commission's right of initiative in a situation where it has not yet adopted the draft proposal for a revised Data Retention Directive. Indeed, disclosure of the legal opinion at stake would put in the public domain internal discussions and deliberations before the College has had the opportunity to debate them. This, in turn, may lead to external interferences, especially in this area of a high sensitive nature, which seriously undermine the Commission's decision-making process as meant by Article 4(3), first paragraph of Regulation 1049/2001. In this regard, it must be stressed that the Commission, which decides as a College and may take a different position as the one recommended by its services including the Legal Service, must have before it all information necessary for the adoption of sound decisions.

In the light of the foregoing, the Legal Service considers of paramount importance that legal opinion reference Ares(2010)828204 remains 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 general interest that the Commission and its services receive frank, objective and comprehensive legal advice and that the institution's decision-making process is protected, including the Commission's right of initiative.

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.

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,