



EUROPEAN COMMISSION

LEGAL SERVICE
The Director-General

Brussels, 13. 03. 2012

By e-mail

Subject: Your request for access to documents

As of 21 February 2012, the Commission has received more than hundred e-mails requesting a copy of the legal opinion reference Ares(2010)828204, including yours. These e-mails have been individually registered as a request for 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. An acknowledgement of receipt has been sent to each of the requestors indicating the reference GESTDEM under which the request was registered.

In reply to your request, you will find below the Legal Service's position as regards disclosure of legal opinion reference Ares(2010)828204.

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*")² and Article 4(3) first paragraph ("*the protection of the decision-making process*")³ 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.

¹ Official Journal L 145, 31.05.2001, page 43.

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, 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*".

At the outset, it should be pointed out that the requested legal opinion has not been rendered in the framework of a legislative activity. Indeed, it was delivered by the Commission's Legal Service in response to a consultation by Directorate-General Home Affairs (DG HOME) in the context of the Commission's internal discussions on a possible revision of the Directive 2006/24/EC⁴ (hereafter "Data Retention Directive").

The legal opinion at stake analyses the possibility to render the application of the Data Retention Directive optional to Member States and the consequences of the ensuing different treatment between Member States 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 may in the future become the subject of a 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 any possible 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.

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 any draft proposal for a revised Data Retention Directive. Indeed, disclosure of this legal opinion 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.

⁴ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

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 light of 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,