



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

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Mr Denis O'HARE
Cyprus Property Action Group

*By e-mail only: denis.ohare@cyprus-
property-action-group.net*

**Subject: Your confirmatory application for access to documents pursuant to
Regulation 1049/2001 – GESTDEM 2012/3618**

Dear Mr O'Hare,

I refer to your e-mail of 12 September 2012, registered on the same day, in which, based on Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, you lodge a confirmatory application for access to documents related to the correspondence between the European Commission and the Cypriot authorities concerning immovable property in Cyprus since 2011.

I also refer to our letter dated 3 October 2012 by which we extended the time-limit for replying to your request by 15 working days in accordance with Article 8(2) of Regulation (EC) 1049/2001.

In your confirmatory application you request a review of the position taken by the Director General for Justice on 5 September 2012.

In your initial application of 16 July 2012, you requested access to the correspondence between the European Commission and the Cypriot authorities concerning immovable property in Cyprus since 2011 and up to present. Having examined your confirmatory request and the documents concerned, I have come to the conclusion that the refusal opposed to you by the Director General for Justice on 5 September 2012 has to be confirmed.

The reasons of this assessment are set out below.

1. CONTEXT OF YOUR REQUEST AND PROCEDURAL BACKGROUND

A number of citizens, originating from Cyprus and other Member States, have raised concerns regarding Cypriot land developers. They claim the use of the land, on which properties purchased by buyers (many of them from the United Kingdom) are constructed, with a view to collateralise bank mortgages granted to them in order to fund future developments. They claim the failure of the developers and banks to inform them of the existence of pre-existing mortgages on the properties offered for sale. As a result, a certain number of properties were sold without conferring the title deeds upon the buyers.

The services of the European Commission are currently investigating the situation under the EU-Pilot-procedure (reference number 2632/11).

MEP Graham Watson asked, on your behalf, for access to all correspondence between the European Commission and the Cypriot authorities on the above matter in letters addressed to Commissioners John Dalli and Michel Barnier. Vice-President Viviane Reding declared in her reply to the MEP, dated 6 July 2012, that, to the extent this correspondence relates to a pre-infringement procedure, the documents requested are covered by one of the exceptions provided for in Regulation N° 1049/2001, notably under its Article 4 and that they cannot therefore be made available to him. She pointed at the possibility to make a specific access to document request, to be addressed to the Secretary-General of the Commission.

You presented a request for access to the same documents by letter dated 16 July 2012 addressed to the Secretary-General of the Commission. The Secretariat-General acknowledged the registration of the request by date of 24 July 2012 (with the reference number GESTDEM 2012/3618). An initial response to the request was given by letter from the Director-General of the Directorate-General for Justice, Françoise Le Bail, with date of 5 September 2012. The access to the requested documents has been refused on the same grounds, with an explicit reference to Article 4 (2) of Regulation N° 1049/2001 (protection of the purpose of inspections, investigations and audits); a partial access has been examined but denied as well since even a partial disclosure "of the requested documents might jeopardize an amicable solution of the dispute and thus the whole process of investigation and inspection and there is no overriding public interest in disclosure".

With an e-mail dated 12 September 2012, you confirmed your initial request and the Secretariat-General, with reference to that e-mail, informed you with letter from 3 October 2012 that an extended time limit, of another 15 working days, was needed to carry out a full analysis of the application. When the deadline for the extended time limit expired on 24 October 2012, you were informed that there would be some delay in sending you the final reply.

2. PROTECTION OF THE PURPOSE OF INVESTIGATIONS

The Commission's services addressed a letter to the Cypriot authorities in the framework of the EU-Pilot procedure with date of 21 October 2011 to investigate the problems encountered with the title deeds of properties purchased in Cyprus and regarding the application of Union law by the Cypriot authorities. The Cypriot government responded with a reply dated 23 January 2012. Following a meeting in Brussels on 18 July 2012, the Commission services addressed a follow-up letter to the Cypriot authorities with date of 8 October 2012. This last correspondence is still part of the pending EU-Pilot procedure.

Access to the above correspondence between the Commission's services and the Cypriot authorities has to be refused, because it is covered by the exception provided for in Article 4(2), third indent, of Regulation (EC) No 1049/2001, which stipulates: "*The institutions shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits*".

In this context and in order for the Commission to be able to carry out its investigative activities as described above and to ensure compliance with Union law by Cyprus, there has to be a climate of mutual trust between the Commission and the Cypriot authorities until the case has been settled.

Indeed, disclosure of the requested Commission's letters and the corresponding reply of the Cypriot authorities at this stage would adversely affect the ongoing discussions between the Cypriot authorities and the Commission and thus reduce the chances of a prompt solution. It is possible that legislation in force and administrative practices in Cyprus be reviewed or amended and that further discussions between the Commission and the Cypriot authorities take place. Public disclosure of the document concerned at this stage would hamper Cyprus' willingness to cooperate with the Commission in a spirit of mutual trust and, thereby, jeopardize the objective of the Commission's assessment which is to achieve compliance with EU law.

Therefore, I consider that the following findings of the General Court developed in the context of infringement proceedings in the *Petrie* judgment¹ also apply to the documents you requested:

"68. (...) the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice...."

This ruling has been recently confirmed by the General Court in a judgment of 9 September 2011 regarding access to correspondence with a Member State on a case regarding alleged infringements of EU environmental law, where the Court acknowledged the existence of a general presumption that disclosure of documents in infringement proceedings in principle undermines the protection of the objectives of investigation activities, as long as these proceedings are ongoing.²

Likewise, the Court of Justice³ has emphasized the absence of access rights in an administrative procedure between the Commission and the concerned Member State.

¹ Case T-191/99, judgment of 11 December 2001, [2001] ECR II-3677.

² Judgment of 9 September 2011 in Case T-29/08, *LPN v Commission*, not yet reported.

³ Judgment of 29 June 2010 in the case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-05885.

Indeed, the Court stated that in paragraph 58 of its judgment in Case C-139/07 P that "*the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file. Account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001. If those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question*".

For this reason, the Court acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities⁴. Like the procedure for reviewing State aid, infringement proceedings on the basis of Articles 258 or 260 TFEU are of a bilateral nature in which the Commission's position is only addressed to the Member State concerned and as such the correspondence is subject to the same protections.

As indicated above, the Commission's investigation is still pending. The Commission services are still assessing the information provided by the Cypriot authorities through EU-Pilot. Non compliance with the points raised by the Commission services within the EU-Pilot enquiry may result in a Commission decision to launch infringement proceedings on the basis of Article 258 TFEU. Consequently, disclosure of the requested document at this stage would adversely affect future discussions between the Cypriot authorities and the Commission and thus reduce the chances of a prompt solution.

As results from the above-mentioned case-law, the exception relating to investigations covers documents drawn up as part of infringement proceedings or with a view to launch such proceedings. The General Court acknowledged the need to preserve the possibility of an amicable resolution of such a dispute and considered that disclosure while the proceedings are ongoing would undermine the purpose of the investigation.

In light of the above, I conclude that the requested document is covered by the exception provided for in Article 4(2), third indent of Regulation (EC) No 1049/2001.

3. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the requested document in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, partial access is not possible considering that the documents concerned are covered in its entirety by the exception under Article 4(2), third indent of Regulation (EC) No 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure.

⁴ Cf. paragraph 61.

The issues at stake are undoubtedly of public interest and there is a clear public interest in knowing what exactly the Commission is objecting to and for which reasons.

Indeed, the Commission explicitly invites the citizens and their interest-organisations concerned to take an active role and to issue their opinion or make their grievances known to the Commission or the competent authorities in their respective Member States, in case they consider that the misbehaving of developers and banks is causing problems or creating barriers to the free movement of citizens within the European Union.

It is the Commission's view that by giving an information within the time limits foreseen within the EU-Pilot procedure, it strikes the right balance between the requirements of transparency and the need to maintain the privileged communication channels with the Member States for exchanging comments concerning the issues at stake.

I also consider that, in this case, the public interest is better served by protecting the climate of mutual trust between the Commission and the Cypriot authorities and preserving the willingness of these authorities to cooperate with the Commission in this investigation. Prompt compliance with the relevant Union legislation would also avoid infringement proceedings being launched.

For all these reasons, I consider that, as regards your request for access to the Commission's detailed opinion and comments issued in the framework of the ongoing EU-pilot investigation and given the current stage of this procedure, the public interest is best served by protecting the climate of mutual trust between the Commission and the Cypriot authorities in order to achieve full compliance by Cyprus with the relevant Union legislation.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,



Catherine Day