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SECRETARIAT-GENERAL

The Secretary-General

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*By registered mail:*

**Mr Borivoje Djordjevic**  
Association "People's Parliament"  
Djordja Lesnjaka 7, Appartment 6  
16000 Leskovac  
Republic of Serbia

**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT  
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2015/0331**

Dear Mr Djordjevic,

I refer to your letter dated 19 February 2015, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> ("Regulation 1049/2001").

**1. SCOPE OF YOUR REQUEST**

In your initial application of 12 January 2015, addressed to the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR), you requested access to:

*the opinion of the European Commission on the draft of Serbian Free Legal Aid Act.*

The Commission has identified the following document as falling under the scope of your request:

<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

- (1) Opinion of the European Commission on the draft of Serbian Free Legal Aid Act ("**document 1**")

In its initial reply of 3 February 2015, DG NEAR refused access to this document based on the exception of Article 4(1)(a), third indent (protection of international relations) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position. You underpin your request with arguments, which I will address in the corresponding sections below.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of DG NEAR to refuse access, based on the exceptions of Article 4(1)(a), third indent (protection of international relations) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001, for the reasons set out below.

### **2.1. The context and the content of the requested document**

The document identified as falling under your access-to-documents request was drafted by the Serbian authorities and sent to the Commission services in the general framework of the accession negotiations between the European Union and Serbia, and more precisely preparations for the Action plan required for the opening of Chapter 23 (Judiciary and Fundamental Rights). Serbia is still in the process of elaborating this Action plan and has engaged in an inclusive consultation process with main national stakeholders and practitioners.

The requested document is part of technical daily consultations in the framework of the preparations for the accession negotiations on Chapter 23. The Commission has an important role in monitoring the progress of the negotiations and has provided a number of recommendations on the measures the Serbian authorities need to undertake to meet the accession requirements in the area of judiciary and fundamental rights. The recommendations, addressing both legal aspects and administrative capacity, are presented in screening reports. The screening report on Chapter 23 was adopted in July 2014 and is available on the website of the European Commission: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/140729-screening-report-chapter-23-serbia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/140729-screening-report-chapter-23-serbia.pdf)

In addition, the Commission publishes yearly progress reports in fulfilling the accession criteria has already, the last one being released in October 2014<sup>3</sup>. The monitoring

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<sup>3</sup> [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20140108-serbia-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf)

exercise has proved to be a strong incentive for the Serbian Republic to speed up its reform efforts in the area of judiciary and fundamental rights, by highlighting key priorities in terms of legislative activities and institutional reinforcement.

A considerable part of the information contained in the requested document has been and shall be reflected in the Commission's regular, public reports. This is also the case for Serbia's Action Plan for Chapter 23.

## **2.2. Protection of international relations**

Article 4(1)(a), third indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of international relations.*

As explained above, the requested document reflects the Commission's opinion on the sensitive issues of effective implementation of the free legal aid regime and the reform of the judiciary. As part of the monitoring mechanism, of which this document forms part, the Commission could decide to engage in a dialogue with the Republic of Serbia to assess the consistent implementation of the reforms launched in the framework of the accession negotiations.

Consequently, disclosing the requested document would clearly undermine the climate of trust with the Republic of Serbia. In addition, the detrimental effect on the atmosphere of mutual trust would also adversely affect the present and future state of the accession negotiations with this and other accession or candidate countries.

As explained by DG NEAR in its reply of 3 February, the Commission cannot provide you with more detailed information on this document without disclosing its substance which is protected by the exception laid down in Article 4(1)(a), third indent of Regulation 1049/2001. In this context, the Court of Justice of the EU acknowledged the institution's wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by Article 4(1)(a), third indent could undermine the public interest<sup>4</sup>.

In view of the above, I consider that there is a real and non-hypothetical risk that public disclosure of the requested document would jeopardise the atmosphere of mutual trust and would undermine the external relations of the EU with the said candidate country. I confirm, therefore, the position of DG NEAR to reject the document requested on the basis of the exception laid down in Article 4(1)(a), third indent of Regulation 1049/2001.

## **2.3. Protection of the decision-making process**

Article 4(3), first subparagraph of Regulation 1049/2001 provides that *[a]ccess 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*

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<sup>4</sup> *Council v. Kala Naft*, C-348/12 P, point 120; CJEU, *Sison v Council*, C-266/05 P, p. 34 and Judgment of General Court of 4 May 2012, *Sophie in 't Veld v Council*, T-529/09.

*refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

As explained above, the document requested forms part of the Commission's efforts to monitor the implementation of *acquis* in the sensitive area of fundamental rights, rule of law and judiciary. The result of such monitoring is presented in a number of Commission reports, which are still in a very early stage of development. It should also be noted that the decision-making process as regards the adoption of this particular piece of legislation has not yet been completed in Serbia.

The decision-making process regarding the national legislation in the area of fundamental rights, rule of law and judiciary in Serbia is a continuous process. Continued and enhanced dialogue and cooperation with the authorities of this country, aimed at achieving compatibility with EU requirements, is an essential part of this process.

Under these circumstances, public disclosure of the comments sent to the Republic of Serbia would not only undermine the climate of trust with this country, as explained in the proceeding section, but would also greatly jeopardise the success of the accession process as such, as it could deprive the Commission of the needed data and cooperation from this and other negotiating countries in the future. Against this background, I take the view that keeping the requested comments confidential is essential for ensuring the viability and integrity of the accession mechanism.

In view of the above, I conclude that the document under review is covered by the exception laid down in Article 4(3), first subparagraph, since its disclosure would seriously undermine the decision-making process in the context of the pre-accession negotiations with Serbia.

The document reflects the Commission's opinions for internal use as part of preliminary discussions between the Serbian authorities and the Commission leading to the adoption of legislation by Serbian authorities in the framework of the pre-accession negotiations with Serbia. Moreover, considering that the pre-accession process is in essence a monitoring activity exercised by the Commission, I take the view that the exception pertaining to the protection of the decision-making process is also applicable in this case to the dialogue engaged with the candidate country and therefore, the requested document is covered also by the exception of Article 4(3), first subparagraph of Regulation 1049/2001.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(3), first and second subparagraph of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application you state that the process of harmonising Serbian legislation with the *acquis* has to be open, transparent, with the possibility to include other parties concerned. Moreover, you underline that you submitted this application

because this draft of Serbian legislation considerably affects the work of your organisation "People's Parliament" and the work of other Serbian NGOs that provide free legal aid.

I wish to point out that the balance should be more in favour of protecting trust between EU and Serbian authorities in the accession negotiations. The Commission needs to protect the public interest relating to the decision-making in accession negotiations with a third country rather than promoting private interests<sup>5</sup>.

The Commission will certainly highlight in its future progress reports, as it has done in the past, any irregularities or deficiencies it detects in the course of the accession negotiations. Relevant information concerning the progress to be made on the above-mentioned sensitive issues has been and is being made public at the national level, as well as European level. Therefore, I consider that the transparency concerns are sufficiently addressed and that the release of the document requested would not add to that transparency. To the contrary, I consider that in this case, the public interest is best served by the publication of the yearly progress reports by the Commission.

I have not been able to identify any overriding public interest that would outweigh the protections provided for in Article 4(3) of Regulation 1049/2001.

I therefore have to conclude that in this particular case there is no such overriding public interest.

I would also like to point out that the invoked exception laid down in Article 4(1)(a), third indent (protection of international relations) of Regulation 1049/2001, which covers the entirety of the document requested, is an absolute exception that does not have to be balanced against any public interest in disclosure. Furthermore, the Commission has a wide margin of appreciation in applying this exception<sup>6</sup>.

#### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 1049/2001, I have also considered the possibility of granting partial access to the document requested.

As noted above, a considerable part of the information contained in the requested document shall be incorporated in the Commission's progress reports and available on the website of the Serbian Ministry of Justice.

I consider that partial access to the requested document would not only undermine the interests described above, but would also create a misleading picture of the current situation, as that document reflects only a *small part of the legislation analysed* by the Commission as part of the ongoing pre-accession monitoring mechanism. In view of the

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<sup>5</sup> Court of Justice, 2007, *Sison v Council*, – C-266/05, paragraph 47.

<sup>6</sup> Court of Justice, 2007, *Sison v Council*, – C-266/05, paragraph 35, confirmed in 2014, *Int'Veld*, C-350/12P, paragraph 63.

above, I conclude that no meaningful partial access is possible without undermining the interests described above.

**5. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Catherine Day', with a stylized flourish at the end.

Catherine Day