BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your e-mail of 8 March 2016 registered as GestDem No 2016/1143

Dear Mr Panichi,

I refer to your e-mail of 8 March 2016 by which you request access, under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, to documents which contain the following information:

"Legal advice prepared in April, or June, or July 2015 by the European Commission's legal services and/or the legal services head, Luis Romero Requena, dealing with a request from Belgian authorities to lift the immunity of OLAF Director-General, Giovanni Kessler".

An examination of the Legal Service's files has revealed that the legal opinions responding to the subject matter of your request are the following:

1. Note of 5 December 2014 from the Legal Service and the Secretariat General to the President and Vice-President Georgieva on the subject "Demande de levée d'immunité présentée par le juge d'instruction".

2. Legal Service's note to the file of 9 September 2015.

3. Note of 9 October 2015 from the Legal Service to the President on the subject "Request for a waiver of immunity".

---

Please note that the Legal Service has made a broad interpretation of your request without having into consideration the temporal limits indicated in your application i.e. "Legal advice prepared in April, or June, or July 2015".

Having carefully assessed the identified documents, I have come to the conclusion that they cannot be disclosed since they are covered by the exceptions provided for in the second indent of Article 4(2) ("protection of legal advice") and the third indent of that Article ("protection of the purpose of inspections, investigations and audits") of Regulation (EC) No 1049/2001.

Document under number 1 is a joint note of the Director General of the Legal Service (Mr Romero Requena) and the former Secretary General of the Commission (Mrs Day) to the President of the Commission and the Vice-President Georgieva. Document under number 2 is an internal note of the Legal Service on the subject-matter covered by the request. Please note that, unlike documents under number 1 and 3, this note was not distributed outside the Legal Service. Document under number 3 is a note of the Director General of the Legal Service to the President of the Commission.

These legal opinions have been rendered by the Legal Service in connection with the wider context of the investigation of a complaint lodged with the Belgian judicial authorities within a national pending procedure. In the course of the investigation, the Belgian federal Prosecutor has requested the Commission, on the basis of Protocol No 7 on the privileges and immunities of the European Union, to waive the immunity of Mr Kessler.

I consider, in the first place, that disclosure of the aforementioned legal opinions would undermine the protection of investigations provided for under the third indent of Article 4(2) of Regulation (EC) No 1049/2001. Indeed, whilst on 2 March 2016 the Commission has taken the decision to waive in part the immunity of the Director General of OLAF in order to allow the Belgian legal authorities to pursue their investigation, that investigation is fully ongoing and subject to an exacting obligation of confidentiality under the applicable national criminal law (secret de l'instruction). Disclosing these legal opinions at this point in time would be contrary to that strict confidentiality of the ongoing judicial investigation, and might also affect the legitimate rights of the person concerned and the presumption of innocence.

Secondly, disclosure of these legal opinions would undermine the protection of legal advice provided for under the second indent of Article 4(2) of Regulation (EC) No 1049/2001 which, as recognised 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 advice. Indeed, disclosure of these documents at present would make known to the public internal opinions in a matter of a highly sensitive nature, drafted

---

2 "The institutions shall refuse access to a document where disclosure would undermine the protection of: – court proceedings and legal advice […] unless there is an overriding public interest in disclosure".

under the responsibility of the Legal Service and the Secretary-General (as regards document under number 1) and intended exclusively for the President and the Members of the Commission (documents under numbers 1 and 3) and for internal discussion within the Legal Service (document number 2).

Disclosing the legal analysis of the Legal Service would clearly have a serious impact both on the Legal Service's capacity to assist the Commission in this highly sensitive matter and on the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice, thus depriving the College of an essential element in the process of performing its tasks.

In the light of the foregoing, it is therefore of paramount importance that the aforementioned Legal Service's opinions remain confidential at this stage.

This is also important as judicial proceedings concerning the Commission decision waiving the immunity are still possible, as the time limit for challenging it has not yet elapsed, and disclosure of the aforementioned documents could seriously undermine the Commission's position in that litigation, breaking the fundamental principle of the equality of arms.

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of giving partial access to the requested legal opinion. However, after a careful examination of the documents concerned I have come to the conclusion that they are entirely covered by the invoked exceptions so that a partial disclosure is not possible.

Pursuant to Article 4(2) of Regulation (EC) No 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 need to safeguard the confidentiality of ongoing judicial investigations as well as the public interest of the Commission to receive frank, objective and comprehensive legal advice.

Furthermore, I have not been able to identify any public interest capable of overriding the public interests protected by the second and third indents of Article 4(2) of Regulation (EC) No 1049/2001. The fact that the requested documents do not relate to a legislative activity, for which the Court of Justice has acknowledged the existence of wider openness \(^4\), provides further support to this conclusion.

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 following address:

---

The Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

Yours sincerely,

Luis ROMERO REQUENA