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**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 2016/1143**

Dear Mr Panichi,

I refer to your message of 21 April 2016, 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 8 March 2016, dealt with by the Commission's Legal Service you requested access to *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.*

The Commission has identified the following documents, as falling into the scope of your request:

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<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. Note dated 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*', composed of the main document and three annexes (annex 3 includes the cover note and the note to the file);
2. Legal Service note to the file of 9 September 2015;
3. Note dated 9 October 2015 from the Legal Service to the Commission President on the subject '*Request for a waiver of immunity*'.

In its reply of 21 April 2016, the Legal Service explained that identification of the above-mentioned documents was based on a broad interpretation of your initial request, i.e.: without taking into consideration the temporal limits indicated therein ([*legal advice prepared in April, or June, or July 2015*]).

In the same letter, the Legal Service refused access to documents (1) – (3), based on the exceptions provided for in Article 4(2), second indent (protection of legal advice) and Article 4(2), third indent (protection of the purpose of investigations) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position.

## **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 the Legal Service to refuse access to the documents requested, on the basis of the exceptions in the second and third indents of Article 4(2) of Regulation 1049/2001, concerning, respectively, the protection of legal advice and the protection of the purpose of investigations. The reasons are set out below.

### **2.1 Protection of the purpose of investigations**

Article 4(2), third indent of Regulation 1049/2001 provides that [*the institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the purpose of inspections, investigations and audits.*]

In your confirmatory application you do not question the applicability of the above-mentioned exception to the requested documents (instead, the argumentation seems to be focused solely on the issue of the overriding public interest, which will be addressed in point 4 of this decision). Following my analysis, I share the justification and reasoning provided by the LS in its initial reply of 21 April 2016.

Documents (1) – (3) have been prepared by the Legal Service in connection with the investigation of a complaint lodged with the Belgian judicial authorities within a pending criminal procedure. In its course, the Belgian Federal Prosecutor has requested the Commission to waive the immunity of OLAF's Director-General. In consequence, the Commission has taken the decision to partially waive the immunity of OLAF's Director-General in order to allow the Belgian authorities to continue their investigation. That investigation, as mentioned by the Legal Service in its initial reply, is fully ongoing and therefore is subject to the obligation of strict confidentiality under the applicable provisions of national criminal law (*'secret de l'instruction'*).

In the light of the above, public disclosure of the documents requested would undermine the confidentiality of the ongoing judicial investigation and affect the legitimate rights and the presumption of innocence of the person concerned. Consequently, there is an actual and non-hypothetical risk that the interest protected by the exception provided for in the third indent of Article 4(2) of Regulation 1049/2001 would be undermined through public release of the documents in question.

Given that the investigation activities in question are still open and ongoing, the legal and factual circumstances relating to the documents requested did not change and consequently, the justification provided by the Legal Service in the initial reply of 21 April 2016 is still valid and applicable.

I conclude, therefore, that access to documents (1) – (3) must be denied on the basis of the exception laid down in the third indent of Article 4(2) of Regulation 1049/2001.

## **2.2 Protection of the legal advice and court proceedings**

Article 4(2), second indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] court proceedings and legal advice*

In your confirmatory application you do not question the applicability of this exception to the requested documents (1) – (3) (the argumentation seems rather to be focused on the issue of the overriding public interest, which I will address in point 4 of this decision). I would like therefore to confirm the justification and reasoning provided by the Legal Service in its initial reply of 21 April 2016.

Public disclosure of documents (1) – (3)<sup>3</sup> would indeed undermine the protection of legal advice, as provided for in the second indent of Article 4(2) of Regulation 1049/2001, which, as recognised by the case-law, must be construed as aiming to protect the Institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice<sup>4</sup>.

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<sup>3</sup> With the exception of annexes n° 1 and n° 2 to document (1) which are annexes to legal advice (and thus part of it) but not themselves legal advice.

<sup>4</sup> Judgment of the Court (Grand chamber) of 1 July 2008 in joined cases C-39/05P and C-52/05P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, (ECLI:EU:C:2008:374), paragraph 42.

In the case at hand, public release of the documents requested would reveal internal opinions in a matter of a highly sensitive nature drafted under the responsibility of the Legal Service and the Secretary-General (document (1)) and/or intended exclusively for the President and the Members of the Commission (documents (1) and (3)) and/or for internal discussion within the Legal Service (document 2). In addition, the contents of document (1) is not only of a particularly sensitive nature but have also a particularly wide scope that goes beyond the context of the specific file at hand.

Disclosure of documents (1) – (3) 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 addition, judicial proceedings concerning the Commission decision to (partially) waive the immunity have been commenced by Mr Kessler (Case T-251/16, *Director General of OLAF v Commission*). Therefore, disclosure of the requested documents, which are inextricably linked to the subject-matter of that pending case, could seriously undermine the Commission's position in that litigation, breaking the fundamental principle of equality of arms.

In the light of the above and given that the legal and factual circumstances<sup>5</sup> relating to the potential release of documents (1) – (3) did not change, the justification provided by the Legal Service in the initial reply of 21 April 2016 is still valid and applicable.

In the light of the above, access to the documents requested<sup>6</sup>, must be denied on the basis of the exception laid down in the second indent of Article 4(2) of Regulation 1049/2001.

### **3. PARTIAL ACCESS**

I have also examined the possibility of granting partial access to documents requested in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, partial access is not possible, as document (2) is fully covered by the exceptions provided for in the second and third indents of Article 4(2) of Regulation 1049/2001.

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

The exceptions laid down in Article 4(2) 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.

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<sup>5</sup> Other than opening of the case T-251/16 mentioned above.

<sup>6</sup> With the exception of annexes n° 1 and n° 2 to document (1) which are annexes to legal advice (and thus part of it) but not themselves legal advice.

In your confirmatory application you argue that *the right for the public to know such an important decision was made and to discount any suggestion that the decision was a political one without a legal foundation requires that these [three] documents be released immediately*.

Whilst I understand that there can be a public interest in obtaining access to the documents in question, I consider in this case that any possible public interest in transparency cannot outweigh the public interest in protecting the purpose of investigations, court proceedings and legal advice falling under the exceptions provided for in the second and third indents of Article 4(2) of Regulation 1049/2001.

The fact that the documents relate to an administrative procedure rather than a legislative act, for which the Court of Justice has acknowledged the existence of wider openness<sup>7</sup>, provides further support to this conclusion.

With regard to your argument concerning the transparency of the process, I would like to refer to the judgment in the *Strack* case<sup>8</sup>, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance but that an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure<sup>9</sup>.

In consequence, I consider that, in this case, there is no overriding public interest that would outweigh the interest in safeguarding the purpose of investigation and court proceedings and legal advice protected by the second and third indents of Article 4(2) of Regulation 1049/2001.

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<sup>7</sup> Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07P, *Commission v Technische Glaswerke Ilmenau GmbH*, (ECLI:EU:C:2010:376), paragraphs 53-55 and 60.

<sup>8</sup> Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 128.

<sup>9</sup> Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 129.

## **5. MEANS OF REDRESS**

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,



*For the Commission*  
*Alexander ITALIANER*  
*Secretary-General*