



EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)
The Director-General

Brussels,

Mr TEFFER
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Subject: **Your application for public access to documents – GestDem No 2020/4275**

Dear Mr Teffer,

We refer to your e-mail of 4 June 2020 in which you apply for a public access to documents, registered on 5 June 2020. The reference number is GestDem No 2020/4275.

You requested access to the following:

“All technical notes and all technical assessments, sent by Olaf in 2015 and 2016 to any European Commission service, regarding the Anti-Contraband and Anti-Counterfeit Agreement between the EU, member states and Philip Morris International (PMI)”.

Following your application, we have identified the following documents:

1. Note of OLAF to the Legal Service of 24 February 2015 (reference Ares(2015)775339)
2. Note of OLAF to the Legal Service of 9 November 2015 (reference Ares(2015)4945290)
3. Note of OLAF to the Secretariat-General, Legal Service and Directorate-General for Health of 13 November 2015 (reference Ares(2015)5058290)
4. Inter-Service Consultation from DG OLAF to Commission Services of 7 April 2015 (reference ARES(2015)1494778)

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I regret to inform you that your application cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4(1)(b), Article 4(2) second indent and Article 4(3) second subparagraph of this Regulation.

Disclosure of these documents would undermine the following:

- a) *privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data, as provided for in Article 4(1)(b).*

Pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC¹ (as well as Regulation (EC) No 45/2001² before entry into force of Regulation 2018/1725).

When access is requested to documents containing personal data, Regulation (EU) 2018/1725 becomes fully applicable³. According to Article 9 of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. This exception applies to **documents 1-4**.

- b) *legal advice, as provided for in Article 4(2) second indent.*

The documents to which you request access relate to the subject of the Anti-Contraband and Anti-Counterfeit Agreement between the EU, Member States and Philip Morris International (PMI) that expired in July 2016. In the year prior to the expiry of this agreement, OLAF, as lead service in the Commission with responsibility for the implementation of the agreement, consulted the Legal Service on two occasions. We consider these documents relate to legal advice. These documents set out preliminary positions for the advice of the Legal Service. While the agreement with Philip Morris has already expired, there are three remaining anti-fraud agreements in place and disclosing certain information could compromise the protection of legal advice, i.e. the Commission's interest in seeking legal advice and receiving frank, objective and comprehensive advice. This exception ensures protection of the work done within the Commission in terms of its correspondence between Directorates-General and the Legal Service.

Therefore, I conclude that disclosure of these notes is prevented by exception to the right of access laid down in the second indent of Article 4(2) of this Regulation. This exception applies to **documents 1 and 2**.

- c) *the institution's decision-making process, as provided for in Article 4(3), second subparagraph.*

¹ OJ L 295, 21.11.2018, p. 39

² OJ L8, 12.1.2001, p. 1

³ Compare judgment of the Court of Justice of the EU of 29 June 2010, 28/08 P, Commission/The Bavarian Lager Co. Ltd, ECLI:EU:C:2010:378, point 63.

In 2015, OLAF as lead service in the Commission with responsibility for the implementation of the PMI agreement, consulted the Legal Service on two occasions, consulted with the Secretariat-General, the Legal Service and DG SANTE on one occasion and launched an Inter-Service Consultation with relevant Commission Services on a technical assessment of the PMI agreement.

While the administrative procedure to which those documents relate has since been closed, the redacted part of these notes contain opinions for internal use, as part of deliberations within Commission. Access to those redacted parts of the internal notes would curtail the ability of Commission staff to freely submit uncensored advice and views. The ability to express views independently within the Commission helps to encourage internal discussions with a view to improving the functioning of the Commission and contributing to the smooth running of the decision-making process. Public access to the document requested on the basis of Regulation 1049/2001 would seriously undermine the decision-making freedom of the Commission, in particular opinions of Commission officials prior to the decisions ultimately taken by the Members of the Commission.

Therefore, I conclude that disclosure of these notes is prevented by exception to the right of access laid down in the second subparagraph of Article 4(3) of this Regulation. This exception applies to **documents 1-4**.

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described in points (a) and (b) above.

After careful examination of **documents 1-3**, only fragmented parts, the reading of which would be meaningless and deprived of any substantive content⁴, would not be covered by any exception. After careful examination of **document 4**, the document to be redacted and the information contained therein which could be made public would be of no substantial value as it is already of public knowledge. I am aware that if a document contains information which is already in the public domain, this does not in principle justify a refusal of partial access, but instead requires its partial disclosure⁵. However, pursuant to settled case-law, in exceptional circumstances a derogation from this obligation may be permissible where the administrative burden would be disproportionate to the applicant's interest in obtaining that information.⁶

I note that the Commission Staff Working Document⁷ "Technical assessment of the experience made with the Anti-Contraband and Anti-Counterfeit Agreement and General Release of 9 July 2004 among Philip Morris International and affiliates, the Union and its Member States" can be accessed at: https://ec.europa.eu/anti-fraud/sites/antifraud/files/technical_assessment_pmi_24022016_en.pdf

Consequently, these documents cannot be partially disclosed under Regulation (EC) No 1049/2001.

⁴ Judgment of the Court of First Instance of 12 July 2001, T-204/99, *Mattila v Council of the European Union and European Commission*, T-204/99, EU:T:2001:190, paragraph 69.

⁵ Judgment of the Court of First Instance of 30 January 2008, *Terezakis v European Commission*, T-380/04, EU:T:2008:19, paragraph 101.

⁶ Judgement of the Court of First Instance of 12 July 2001, *Mattila v Council of the European Union and European Commission*, T-204/99, EU:T:2001:190, paragraph 69.

⁷ SWD(2016) 44 final

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. In your application, you did not indicate any specific overriding public interest in disclosure. I have also not identified any overriding public interest justifying disclosure of the requested documents.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Bruxelles

Alternatively, it may be submitted by email to: sg-acc-doc@ec.europa.eu

I also draw your attention to the Privacy Statement available on the Commission website: <https://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=privacy>

Yours sincerely,

Ville Itälä

Annexes: 1. Ares(2015)775339;
2. Ares(2015)4945290;
3. Ares(2015)5058290;
4. Ares(2015)1494778.

Privacy notice

Pursuant to Articles 15 and 16 of Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by Union Institutions, bodies, offices and agencies and of the free movement of such data, please be informed that your personal data are stored in OLAF's electronic and paper files concerning this matter for the purposes of ensuring conformity with the requirements of Regulation 1049/2001 and Commission Decision 2001/937/EC.

The categories of your personal data being processed are identification and contact data and any other personal data provided by or to you in relation to your request. Officials within OLAF and other Commission services responsible for dealing with requests for access to documents, and third parties, within the meaning of Articles 4(4) and 3(b) of Regulation 1049/2001, and Article 5 of Commission Decision 2001/937/EC, have access to your personal data. Personal data that appear on the requested document may only be disclosed to the applicant following an assessment under Article 9(b) of Regulation (EU) 2018/1725. There is no automated decision process by OLAF concerning any data subject.

The retention period for public access to documents which do not concern OLAF investigations is a maximum of 10 years.

You have the right to request access to your personal data, rectification or erasure of the data, or restriction of their processing. Any request to exercise one of those rights should be directed to the Controller (OLAF-FMB-DATA-PROTECTION@ec.europa.eu). You may contact the Data Protection Officer of OLAF (OLAF-FMB-DPO@ec.europa.eu) with regard to issues related to the processing of your personal data under Regulation (EU) 2018/1725.

You have the right to have recourse to the European Data Protection Supervisor (edps@edps.europa.eu) if you consider that your rights under Regulation (EU) 2018/1725 have been infringed as a result of the processing of your personal data by OLAF.

The complete privacy statements for this and all other OLAF personal data processing operations are available at http://ec.europa.eu/anti_fraud.