



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B.4/MF/bb - sg.dsg2.b.4(2014)415508

Mr Ernst Sorenson

By e-mail only:
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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° 1049/2001¹

Your confirmatory application for access to documents – Gestdem 2013-4989

Dear Mr Sorenson,

I refer to your e-mail dated 30 November 2013, registered on 3 December 2013, in which you lodge a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter: Regulation 1049/2001).

I further refer to our holding reply of 23 December 2013.

1. SCOPE OF YOUR REQUEST

a) Initial request

Through your initial request of 8 October 2013, registered on 9 October 2013, you requested access to:

“[a]ny reports, documents, annexes, notes, etc received by Mrs Catherine Day from EU audit bodies (OLAF, court of auditors, European audit services) related to irregularities and false accounting at Danish Institute for Human Rights. Any measures issued by Ms Day following those reports (relevant documents)”.

b) Initial reply

The Secretariat-General, in its reply of 19 November 2013, informed you that *“following intensive research, we have been unable to identify any document as falling within the scope of your request, which is therefore devoid of purpose.”*

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145, 31.05.2001, p. 43.

c) Confirmatory request

Through your confirmatory request you asked the Commission to review the initial decision. You provided a reference number for one document which you consider as falling within the scope of your initial request. In particular, you indicated that:

“OLAF Director - Mr Kessler refers here in his letter 30647/29 11 2013 <http://www.asktheeu.org/en/request/622/response/3546/attach/html/4/Reply%20to%20Mr%20Stabenow.tif.html> to the document in question. (see Pt. 3.2 last paragraph).

I would like to request a review of your decision of 19/11/2013 and to grant me access to the document in question and to any other documents I referred in my original request (could be archived in the same place as the document I was refused access). This document exist. Details can be found in Mr Kessler`s Letter where the Document in question is referred as "Note for the Attention of Mrs Catherine Day, Secretary General of the European Commission", incoming references "Transmission of Information THOR (2013)19989".

I note that, by the same e-mail, you requested access to an additional document.³ This new initial request for access to documents was registered on 3 December 2013 under reference *Gestdem* 2013/6051 and attributed to the Directorate-General for Justice, which identified and disclosed one document on 20 December 2013.

2. DOCUMENTS CONCERNED

Following a new search based on the title and reference number of one document which you provided in your confirmatory application, we have identified two documents as falling within the scope of the request:

1. Note from the Secretary General for the attention of Ms Viviane Reding, Vice-President of the Commission, Ms Francoise Le Bail, Director-General DG JUST, of 9 September 2013;
2. Attachment to the above letter: Note from OLAF for the attention of Mrs Catherine Day, Secretary General of the European Commission – Transmission of information, THOR (2013)19989.

These documents concern investigations by the European Anti-Fraud Office (OLAF) into allegations of irregularities and possible fraud in contracts and grants awarded by the Directorate-General for Justice and the Fundamental Rights Agency to the Danish Institute for Human Rights.

Document 2 is a briefing for Ms Catherine Day, Secretary General of the European Commission, on OLAF's assessment of the information that it received in case OF/2013/0583. Document 1 concerns the same investigations and summarises OLAF's results and suggestions.

As document 2 was drafted by OLAF, the latter will take an initial decision on your request in accordance with Article 3 of the Implementing Rules to Regulation 1049/2001. That document therefore falls outside the scope of the present decision. This decision is consequently limited only to document 1.

3. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

Having carefully examined your request and document 1 in light of the provisions of Regulation 1049/2001, I have come to the conclusion that access to the document has to be refused based on the exception of Article 4(2), third indent (protection of the purpose of investigations), for the reasons set out below.

3.1. Case law on general presumptions linked to administrative investigations

The Court of Justice - in recent case law⁴ - has confirmed that to interpret Regulation (EC) No 1049/2001, account must be taken of relevant sectorial rules governing the administrative procedure under which the documents requested under Regulation (EC) No 1049/2001 were gathered.

In particular, the Court has found that if these rules contain specific confidentiality rules or do not grant the party concerned by the respective administrative procedure a right to access the requested documents, there is a general presumption that Article 4 (2) third indent of Regulation (EC) No 1049/2001 applies when the same documents are requested under the said Regulation. Otherwise, if those interested parties - or any other person - were able to obtain access on the basis of Regulation (EC) No 1049/2001, the specific sectorial rules would be circumvented.

Therefore, there is a general presumption that disclosure of the documents forming part of the administrative file of investigations governed by specific rules resulting in restricted access to the file undermines, in principle, the protection of the objectives of that investigation. This implies that the disclosure of the requested document can be refused without carrying out a concrete, individual examination of that document.

I would also like to draw your attention in this respect to the Court of Justice's confirmation, in the above-mentioned judgments, that administrative activities are to be

³ "I would like also to access the Letter of 7 august 2013 mentioned in this document disclosed recently by EC to the public <http://www.asktheeu.org/en/request/877/response/3547/attach/6/3720.PDF.pdf> (details in letter JUST / ARES 30 SEP. 2013 - 3142128)."

⁴ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07 P, *European Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 56-57 and 63; Judgment of the Court (Grand Chamber) of 28 June 2012 in case C-404/10 P, *European Commission v Editions Odile Jacob SAS*, paragraphs 130-131; Judgment of the Court (Grand Chamber) of 8 December 2011 in case C-477/10 P, *European Commission v Agrofert Holding, a.s.*, paragraph 56-59 and 64-66; Judgment of the Court of 9 September 2011 in case T-29/08, *Liga para Protecção de la natura v European Commission*, paragraph 117; Judgment of the Court in case T-380/08, *Kingdom of the Netherlands v European Commission*, paragraph 35.

clearly distinguished from legislative procedures, for which the Court has acknowledged the existence of wider openness.

It is in light of this case law, combined with the specific restricted access and confidentiality rules applicable to OLAF investigations, that your request for access must be assessed, as explained below.

3.2. Specific restricted access and confidentiality rules defined in the sectorial rules governing OLAF's investigations

3.2.1. Confidentiality of information obtained from informants and witnesses during an OLAF investigation

In the present case, OLAF's administrative procedures are regulated by Regulation 833/2013 concerning investigations conducted by OLAF⁵.

In the case law referred to in footnote 3, the Court confirmed the existence of a general presumption of non-accessibility where a generalised access to documents on the basis of Regulation 1049/2001 would unbalance sectorial legislation aimed at ensuring an increased protection of information obtained from persons who are, under the same sectorial rules, under a legal obligation to communicate the respective information. In this respect, the Court has acknowledged that disclosure of information protected by sectorial rules under Regulation 1049/2001 could undermine the interests of persons who have provided information, as well as the purpose of the proceedings concerned, as the prospect of public disclosure of information provided could jeopardise the willingness of parties involved in the procedure to cooperate when such proceedings are pending.

In addition, the general presumption of non-disclosure of documents protected by confidentiality applies during the investigation and after the investigation has been closed. In that regard, in its *Odile Jacob* judgment referred to in footnote 3, the Court held that *[h]aving regard to the nature of the interests protected in the context of merger control proceedings, clearly the conclusion reached in the preceding paragraph of this judgment is correct irrespective of whether the request for access concerns a control procedure which is already closed or a pending procedure. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether a control procedure is pending. Furthermore, the prospect of such publication after a control procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending.*

The conclusion reached by the Court applies, *mutatis mutandis*, to sensitive information provided by informants in the framework of OLAF investigations. Indeed, the rules governing OLAF's investigations contain a balanced system of an obligation to provide information while also protecting such information.

⁵ Regulation (EU, Euratom) No 833/2013 of the European Parliament and of the Council of 11 September 2013, Official Journal and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) concerning investigations conducted by the European Anti-Fraud Office (OLAF) and No 1074/1999, Official Journal L 248 of 18 September 2013, p. 1.

OLAF is legally bound, under the legislation governing its investigations, to treat the information it obtains during an investigation as confidential and subject to professional secrecy. In this regard I would draw your attention to Article 10 of Regulation 883/2013. This provision protects not only individual interests but also the purpose of investigations conducted by OLAF⁶.

The confidentiality requirements of Article 10 (1) and (2) aim, on the one hand, at safeguarding the successful conduct of an investigation in the public interest and, on the other hand, at respecting the legitimate interests of the individuals involved in such investigations, so that the information they provide to the Commission is used only for the purposes of the investigation.

In this context it is important to note that OLAF's investigations depend upon the willingness of informants and witnesses to provide such information. Therefore these persons must be reassured that their statements will be kept confidential. With the prospect of finding that their information, explanations or assumptions are disclosed to the public, they might be inclined to censor the information they give or to hold back sensitive information during the investigation.

Moreover, EU staff members are under the legal obligation to report any facts that give rise to the presumption of an illegal activity detrimental to EU-interests and have a duty to cooperate with OLAF and to provide OLAF with all necessary information during OLAF's investigation. Also (staff members of) economic undertakings which benefit from European funds are in many instances under a contractual and/or legal obligation to cooperate with OLAF. Equally, information obtained through other investigative means (like computer forensic examination, inspection of offices, on-the-spot-checks, etc.) is covered by Article 10 (1) and (2) of Regulation 883/2013.

In any event, the cooperation of those who hold relevant information requires the protection of the information obtained, according to the conditions established by the Court and by virtue of the protection of the investigations guaranteed by Article 4 (2), third indent of Regulation 1049/2001.

The context and purpose of the confidentiality rules applicable to OLAF investigations – as set out above – imply that confidentiality must also be ensured after the closure of the relevant investigation. Therefore documents that record, transmit, analyse and evaluate information received in the course of an OLAF investigation, such as the document to which you seek to obtain access, come under the general presumption that disclosure would be harmful to the purpose of the investigation in the sense of Article 4(2), third indent of Regulation 1049/2001.

⁶ In this context, "investigation" is to be understood in a broad sense comprising all information collected during the process.

3.2.2. *No access to the file by parties forming the object of an OLAF investigation*

Regulation (EC) No 833/2013 does not grant the party concerned by an investigation any right of access to documents in OLAF's investigation file. Moreover, the Court of Justice has confirmed that the parties concerned do not have such a right⁷.

It follows from the above that in the present case the conditions set by the Court for applying a general assumption of non-disclosure under Article 4 (2), third indent of Regulation 1049/2001, are met. Indeed, a general right to access the documents related to OLAF's investigation files under Regulation 1049/2001 would circumvent the legislator's decision not to grant a right of access of interested parties to OLAF's investigation file.

4. PROTECTION OF THE PURPOSE OF INVESTIGATIONS

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

As indicated above, document 2 is a note from OLAF informing the Secretary General of its investigations in case OF/2013/0583 concerning allegations of irregularities and possible fraud by the Danish Institute for Human Rights. This document comprises the main relevant information gathered during OLAF's investigations, and therefore forms part of the administrative file of the investigations. Document 1, which is a note from Secretary-General Catherine Day to Vice-President Reding, concerns the same investigations and summarises OLAF's results and suggestions.

OLAF, as the author of document 2, provided an initial reply to you on the possible disclosure of this document. It concluded that irrespective of the closure (or not) of the investigations, all documents preparing the final decision fall under the protection of Article 4(2), third indent, of Regulation 1049/2001, based on a general presumption of non-disclosure. I also note in this respect that on 29 November 2013, 9 January 2014 and 10 February 2014, OLAF refused document 2 to three other applicants respectively, further to their requests for access to documents.

In light of the reasoning set out above, the Commission considers that this reasoning has to be followed also for document 1. Indeed, the specific rules governing OLAF investigations do not envisage any access of interested parties to the administrative file of an investigation. Moreover, in order to ensure the effectiveness of investigations led by OLAF into cases of possible fraud, it is essential to preserve a climate of mutual trust between all parties involved in the investigations, and hence the confidentiality of these investigations is of high importance. The investigations led by OLAF – and the underlying evidence and information sources – therefore require strict protection from the public, even after the investigation has been closed.

⁷ Judgment of the General Court of 18 December 2003 in case T-215/02 *Gomez-Reino v Commission*, point 65; T-259/03 *Nikolaou v Commission*, point 242; T-48/05 *Franchet and Byk v Commission*, point 247.

I therefore consider that document 1 falls under the exception of Article 4(2), third indent, of Regulation 1049/2001 protecting the purpose of investigations, and that access has to be refused on that basis.

5. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), third indent of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interest protected by virtue of Article 4(2), first and third indents of Regulation 1049/2001.

Considering the confidential nature of the investigation proceedings in this case and the reputational risk for parties involved in fraud cases, I can see no public interest in the release of the document concerned by your request which would outweigh the protection of the commercial interests of legal persons and the protection of the purpose of investigations.

In this respect, I would also like to draw your attention to paragraph 60 of the judgment of the Court of Justice in the *Technische Glaswerke Ilmenau* case referred to in footnote 3 above where the Court confirmed that in administrative matters, such as the ones at stake, the public interest in transparency does not carry the same weight as in legislative matters. Consequently, I consider that the prevailing interest in this case is to protect the purpose of the investigations.

6. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the document requested, in accordance with Article 4(6) of Regulation 1049/2001. However, partial access is not possible considering that documents are covered in their entirety by the exception protecting the purpose of investigations, as explained above.

7. 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