



EUROPEAN ANTI-FRAUD OFFICE

THOR

22 MARS 2016

N° 10126

Directorate A: Investigations I  
Director

**Vincent HARMSEN**

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Via registered mail

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Brussels  
THOR/C4/LL/cg  
OLAF.C.4(S)(2016)9728

Subject: **Your application for public access to documents  
THOR(2016)7874**

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OF Nr **OF/2015/1139**

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Dear Mr Harmsen,

We refer to your request for access to documents made by the e-mail dated 29 February 2016 and registered in OLAF on 2 March 2016 under THOR(2016)7874.

### **1. Scope of your application**

You requested, '*under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001*', documents containing the following information:

*'All correspondence (including e-mails), agendas, minutes of meetings and any other reports of such meetings where loans provided by the European Investment Bank (EIB) to Volkswagen were mentioned by officials of OLAF and/or third parties (between January 2010 and September 2015).'*

### **2. Preliminary remarks**

OLAF wishes to clarify from the outset that OLAF is legally bound to treat all information it obtains during its investigations as confidential and subject to professional secrecy, in particular pursuant to Article 339 of the Treaty on the functioning of the European Union, Article 10 of Regulation (EU, Euratom) No 883/2003 and Article 17 of the Staff Regulations.

However, the purpose of Regulation (EC) No 1049/2001 is to give access to documents to the public at large. Any document disclosed to an individual under this Regulation then becomes automatically available to any other member of the public whenever there is a subsequent request. Consequently, attention is drawn to you to the fact that documents disclosed under this Regulation enter the public domain.

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### **3. Assessment of the documents and relevant applicable exceptions**

Having carefully considered your request, OLAF regrets 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 of this Regulation.

The documents which you seek to obtain are part of the file of an on-going OLAF investigation and therefore they are covered by the exception under Article 4(2), third indent of Regulation 1049/2001 which stipulates that the institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. We have not identified any other documents which are not part of that case file and which would fall into the scope of your request.

### **4. General presumption of applicability of the protection of the purpose of inspections, investigations and audits as referred to in Article 4(2) third indent of the Regulation**

The Court of Justice has held that to determine the scope of the Regulation (EC) No 1049/2001, account must be taken of relevant sectoral rules governing the administrative procedure under which the documents requested under Regulation (EC) No 1049/2001 were gathered<sup>1</sup>.

In particular, the Court stated that if specific rules do not grant the party concerned by the respective administrative procedure a right to access the requested documents (as it is the case with regard to Regulation (EU, Euratom) No 883/2013 governing OLAF's investigations<sup>2</sup>), 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<sup>3</sup>. Otherwise, if those interested parties – or any other person - were able to obtain access on the basis of Regulation (EC) No 1049/2001, the system of the sectoral rules would be unbalanced. Therefore, a general presumption has to be acknowledged that disclosure of the documents within the administrative file, in principle, undermines the protection of the objectives of investigation activities.

This implies that the disclosure of the requested documents can be refused without carrying out a concrete, individual examination in order to assess whether their disclosure may seriously undermine the protected interest, and that no partial access needs to be considered (see below). In addition, the general presumption applies during the investigation and also after the definitive closure of the investigation.<sup>4</sup>

The documents to which you requested public access contain information gathered using OLAF's investigative powers and the analysis and assessment of that information by OLAF. They also concern OLAF's working relations with other EU institutions and bodies.

In respect of these documents, OLAF is legally bound, pursuant to Article 339 of the Treaty on the Functioning of the European Union, Article 10 of Regulation (EU, Euratom) No 883/2013, and Article 17 of the Staff Regulations, to treat it as confidential and subject to professional secrecy.

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<sup>1</sup> C-477/10 P, *Agrofert Holding v Commission*, par.50; C-139/07 P *Commission v Technische Glaswerke Ilmenau*, par.55 ff.; C-28/08 p *Commission v Bavarian Lager*, par.40 ff.

<sup>2</sup> See for example judgment in Case T-391/03 and T-70/04 *Y Franchet and Byk v Commission*; T-259/03 *Nicolaou v Commission*.

<sup>3</sup> In particular C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, but also C-477/10P, *Agrofert*.

<sup>4</sup> T-623/13, *UAHE vs. Commission*, par. 72-79, and T-404/10P, *Editions Odile Jacob v Commission*, par. 93 and 128.

Moreover, the following provisions of Regulation 883/2013 regulate and restrict the use of information in OLAF investigation files, before, during and after an OLAF investigation: Articles 3 (external investigations), 4 (internal investigations), 5 (opening of investigations), 6 (access to information in database prior to the opening of an investigation), 7 (investigations procedure), 8 (Duty to inform OLAF), 9 (procedural guarantees), Article 10 (confidentiality and data protection), 11 (investigation report and action to be taken following investigations), 12 (Exchange of information between OLAF and the competent authorities of Member States), 13 (cooperation between OLAF and Eurojust and Europol), 14 (cooperation with third countries and international organisations), 15 (Supervisory Committee) and 16 (exchange of views with the institutions), 17 (Director-General).

The protection of confidentiality of information in the legal framework applicable to OLAF investigations aims, on the one hand, at safeguarding the successful conduct of an investigation in the public interest and, on the other hand, at safeguarding the legitimate interests of individuals, so that the information they provide is used only for the purposes of the investigation.

OLAF's investigations, as well as possible subsequent EU or national procedures, 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 and that could seriously compromise the effectiveness of OLAF's investigative activities<sup>5</sup>.

For these reasons, the cooperation of those who hold relevant information requires the increased protection of the information obtained, according to the conditions established by the Court and by virtue of the protection of the purpose of the investigation (Article 4 (2) third indent of Regulation (EC) No 1049/2001)<sup>6</sup>. Furthermore, OLAF may communicate with other EU authorities in the context of its investigations and also relies on their cooperation.

Hence, the above case-law is applicable by analogy to the OLAF legal framework and the documents that form OLAF's investigation files come under a general presumption that disclosure would be harmful to the investigation.

In addition, having regard to the nature of the information processed in the context of OLAF investigations, the publication of the sensitive information contained in the OLAF case files might harm the protection of personal data and/or the integrity of persons involved in the investigation, as sources of information, witnesses, private persons, officials of the competent authorities and OLAF officials.

In view of the foregoing, the documents in OLAF's investigation files fall under the presumption of non-accessibility as documents containing information collected during an OLAF investigation and subject to professional secrecy. Consequently, they are exempt from disclosure to the public.

This conclusion is without prejudice to the application of other relevant exceptions referred to in Article 4 of Regulation 1049/2001 to the requested documents. However, in the present circumstances, OLAF has not considered it necessary to analyse the applicability of those exceptions.

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<sup>5</sup> C-477/10P, *Agrofert*, 28 June 2012, par. 66

<sup>6</sup> T-623/13, *UAHC*, par. 72–79.

#### **4. Partial Access**

OLAF has also examined the possibility of granting partial access to the requested documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

Partial access is not possible, given that the information the documents contain falls entirely under general presumption of applicability of Article 4(2), third indent of Regulation 1049/2001 in the context of inspections and audits.

#### **5. Overriding public interest in disclosure**

The exceptions laid down in Article 4(2) and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. For such an interest to exist it, firstly, has to be a public interest and, secondly, it has to outweigh the interest protected by the exception to the right of access.

OLAF understands the importance of transparency of the functioning of the EU institutions and particularly of the European Commission. However, given the nature of the anti-fraud investigations conducted by OLAF, and the confidential nature of information collected, such as sources of information, content of case files and reputation of natural persons, OLAF considers there are no elements that would show the existence of an overriding public interest in disclosing the requested documents.

#### **6. Confirmatory application**

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting OLAF to review this position. Pursuant to Article 4 of Commission Decision 2001/937/EC, ECSC, Euratom, such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Director General of OLAF.

Any confirmatory application to OLAF should be sent to the following address:

Mr Giovanni KESSLER  
Director-General OLAF  
European Commission  
Rue Joseph II, 30  
B-1000 BRUXELLES  
BELGIUM.

Your attention is drawn to the privacy statement below.

Yours sincerely,



Petra KNEUER

### **Privacy statement**

Pursuant to Article 11 of Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on 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.

The categories of your personal data being processed are identification and contact data (name, address, e-mail, telephone, fax) 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 have access to your personal data.

All documentation and communications concerning OLAF investigations are stored in the relevant OLAF investigation files and are retained for a maximum of 15 years. Thus personal data contained in requests for public access to documents concerning OLAF investigations are retained for a maximum of 15 years.

You have the right to access those data and to correct and complete them. On request and within three months from its receipt, you may obtain information concerning your personal data which we have processed. Any such request should be addressed to the Controller (OLAF-FMB-Data-Protection@ec.europa.eu).

You may lodge a complaint concerning the processing of your personal data with the European Data Protection Supervisor (edps@edps.europa.eu) at any time.

The complete privacy statements for this and all other OLAF personal data processing operations are available at [http://ec.europa.eu/anti\\_fraud](http://ec.europa.eu/anti_fraud).