



Directorate C : Investigation Support  
Director

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Via e-mail and registered mail

Brussels,  
olaf.c.4(2016)4392012

Subject: **Your request for public access to documents**

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Dear Mrs Hirsch,

We refer to your correspondence dated 29 June 2016 in which you make a request for public access to documents, registered on 1 July 2016 under Ares(2016)3147245.

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

You have requested public access to documents containing the following information:

*"The number, subject-matter and date of all the complaints submitted against the Spanish administration from 2008 to date, including information as to whether an investigation was opened or not in their respect."*

### **2. Assessment of your application and relevant applicable exceptions**

At the outset, please note that OLAF has not identified one document that has all the information you request. The information you request cannot be retrieved by means of a normal and routine search from OLAF's Case Management System using the tools available for that purpose, as the system is not set up to run such a search in our database.

OLAF therefore interprets your request as aiming at obtaining documents from the case files of OLAF relating to complaints received against the Spanish public administration since 2008.

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 numerous OLAF case files and they are therefore covered by the exceptions 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 and Article 4(3), second paragraph of Regulation 1049/2001, which stipulates

the protection of the decision making process, unless there is an overriding public interest in disclosure.

The Court of Justice confirmed that it is open to the institutions concerned to base their decisions on general presumptions which apply to certain categories of documents, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature<sup>1</sup>. The recognition of a general presumption that disclosure of documents of a certain nature would, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation 1049/2001 allows the institution concerned to treat a request in a global manner and to reply to it accordingly<sup>2</sup>.

In particular, the European Courts recognised in recent case-law<sup>3</sup> the existence of a general presumption under which the disclosure to the public under Regulation 1049/2001 of documents related to OLAF investigations could fundamentally undermine the objectives of the investigative activities, as well as the decision making process, both now and in the future.

As the Court has outlined in the *Strack* case, to determine the scope of the Regulation 1049/2001, account must be taken of relevant sectoral rules governing the administrative procedure under which the documents requested under Regulation 1049/2001 were gathered<sup>4</sup>, in the case at hand, Regulation 883/2013, which governs OLAF's administrative activity and provides for the obligation of confidentiality with regard to all information gathered during investigations.

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 the information it obtains during an investigation as confidential and subject to professional secrecy. In addition, the case law has made clear that the persons concerned by an OLAF investigation have no right of access to the file of that investigation.<sup>5</sup>

In view of that regulatory context, the Court held that allowing public access to OLAF investigation documents would be particularly detrimental to OLAF's ability to fulfill its mission of fight against fraud in the public interest. The disclosure of the documents concerned would seriously affect the decision-making process of OLAF, as it would seriously jeopardize the full independence of future OLAF investigations and their objectives by revealing OLAF's strategy and working methods and by reducing OLAF's power to make independent assessments and to consult the Commission services or other EU institutions about very sensitive issues.

It could also discourage individuals to send information concerning possible fraud thus depriving OLAF of useful information to initiate investigations aiming at protecting the financial interests of the Union. They must be reassured that their statements will be kept confidential otherwise, they might be inclined to censor the information they give or to hold back sensitive information.<sup>6</sup>

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<sup>1</sup> Judgment of the Court of 27 February 2014, *Commission v EnBW*, C-365/12P, EU:C:2014:112, paragraph 65..

<sup>2</sup> See judgment in *Commission v EnBW* above, EU:C:2014:112, paragraphs 65 and 68.

<sup>3</sup> See judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 162.

<sup>4</sup> See judgment Court of Justice of 28 June 2012, *Agrofert Holding v Commission*, C-477/10 P, EU:C:2012:394, paragraph 50; judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 55 ff.; judgment of the Court of Justice of 29 June 2010, *Commission v Bavarian Lager*, C-28/08, EU:C:2010:378, paragraph 40 ff.

<sup>5</sup> See Judgment of the General Court of 18 December 2003, *Gómez-Reino v Commission*, T-215/02, EU:T:2003:352, paragraph 65.

<sup>6</sup> See judgment in *Agrofert Holding v Commission*, cited above EU:C:2012:394, paragraph 66.

The specific confidentiality rules regarding the documents related to OLAF investigations, even with regard to the persons concerned by such investigations<sup>7</sup> is justified not only in so far as OLAF collects, as part of such an investigation, sensitive business secrets and highly sensitive information on individuals whose disclosure could significantly harm their reputation, but also to the extent that the access to documents relating to an internal investigation by OLAF, even after the conclusion of the investigation in question (especially those containing opinions for internal use as part of deliberations and preliminary consultations within OLAF) might, as explained above, seriously hamper the work of OLAF, disclose the methodology and instruction OLAF strategy, harm the availability of those involved in the procedure to collaborate in the future and, therefore prejudice the proper functioning of the investigations in question and the achievement of their objectives.

The publication of the sensitive information contained in the OLAF investigative files is likely to harm the protection of personal data regardless of whether an investigation is pending or closed. The prospect of such publication after an investigation is closed runs the risk of adversely affecting the willingness of informants and of those who hold relevant information to cooperate with OLAF when such a procedure is pending, and that could seriously compromise the effectiveness of OLAF's investigative activities.

Furthermore, OLAF may cooperate with national administrative or judicial authorities and vice versa in the context of its investigations<sup>8</sup>. The effective functioning of cooperation mechanisms between OLAF and the competent authorities, which was established within the European Union in order to ensure respect of the rules on the protection of the financial interests of the European Union implies that information exchanged between OLAF and these authorities remains confidential.

To these arguments, it must be added that according to the case law of the Court, the administrative activity of the Commission does not require the same extent of access to documents as required by the legislative activity of a Union institution<sup>9</sup>.

In view of the foregoing, the documents in OLAF's case files fall under a general presumption of non-accessibility as documents containing information collected during an OLAF investigation and subject to professional secrecy. In accordance to the case-law, that presumption applies in full regardless of whether the request for access to documents concerns an ongoing or a closed investigation.<sup>10</sup> In addition, the general presumption also entails that the documents covered by that presumption are not subject to the obligation to assess whether a partial access should be granted to them pursuant to Article 4(6) of Regulation No 1049/2001.<sup>11</sup>

Consequently, the documents requested are exempt, in principle and in full, from disclosure to the public, unless the applicant demonstrates that the presumption is not applicable because an overriding public interest justifies the disclosure of the requested documents.<sup>12</sup>

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<sup>7</sup> See, to that effect, judgment of the General Court of 6 July 2006, *Franchet and Byk v Commission*, T-391/03 and T-70/04 Y, EU:T:2006:190, paragraph 255.

<sup>8</sup> Judgment of the General Court of 12 May 2015, *UAHE v Commission*, T-623/13, EU:T:2015:268, paragraphs 72-79.

<sup>9</sup> Judgment of the Court of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 91.

<sup>10</sup> Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 162.

<sup>11</sup> *Ibid.*, paragraph 168.

<sup>12</sup> *Ibid.*, paragraph 91.

#### **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 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. Other remarks**

Although your request for public access cannot be granted, please note that the annual reports of OLAF (available at: [https://ec.europa.eu/anti-fraud/about-us/reports/olaf-report\\_en](https://ec.europa.eu/anti-fraud/about-us/reports/olaf-report_en)), as well as the Annual Reports on the protection of the EU's financial interests ("PIF" Reports, available at: [https://ec.europa.eu/anti-fraud/about-us/reports/communities-reports\\_en](https://ec.europa.eu/anti-fraud/about-us/reports/communities-reports_en)) may contain some information regarding Spain that may be useful for your research.

#### **7. 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,

Beatriz SANZ REDRADO

## **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).