



Directorate C: Investigation Support
Director

Barbara PELO
Slotermeerlaan 13
1063 Amsterdam
Netherlands

E-mail:

ask+request-6482-
b2925b7f@asktheeu.org

ask+request-6483-
32e8a497@asktheeu.org

Via e-mail and registered mail with
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Subject: Your application for public access to documents

Dear Ms Pelo,

We refer to your e-mails of 2 March 2019 addressed to the Secretariat-General of the Commission and registered in OLAF on 13 March 2019 under OCM(2019)5897, by which you requested access to the travel expenses of Mr G. Kessler (DG BUDG advisor, former Director General of OLAF), E. Bianchi (OLAF Director B), Francesco Albore (OLAF staff member) for the period 1 January 2015 to 31 December 2018 inclusive. In particular you asked for documents that contain, for each of the trips, the following information:

- place of origin and destination, and the amount spent on travel or transportation;
- exact dates and duration of the trip;
- amount spent on accommodation;
- amount spent on subsistence;
- other information, such as possible miscellaneous costs.

If the travel was by air taxi and a team of people were travelling, you also asked for documents with details on other travellers, at minimum their names and job titles. You further remarked that that you seek only for name and surname of the relevant persons, something that, as you say, is already in the public domain. You do not seek for bank accounts, office addresses, signatures or telephone numbers.

Taking into account the information you requested, we consider your request as an application for access to documents under Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents.

1 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145, 31.05.2001, page 43.

1. Assessment of the documents under Regulation (EC) 1049/2001 - relevant applicable exceptions

Having carefully considered your application, OLAF regrets to inform you that your application cannot be granted, as disclosure is prevented by the exceptions to the right of access laid down in Article 4 of Regulation (EC) 1049/2001 based on the following considerations.

1.1 Protection of the privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that the institutions shall refuse access to a document where 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.

According to the definition provided for in Article 3(1) of Regulation 2018/1725², personal data *means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.*

Consequently, the information requested, by its very nature constitutes personal data within the meaning quoted above. Indeed, your request concerns concrete and clearly identified natural persons.

As far as your request forming the subject of this decision is concerned, the information requested is included in the cost statements relating to the official assignments (business trips) of the former Director-General of OLAF, Directors and some other staff members you mentioned. These cost statements contain information directly related to the concrete individuals and therefore constitute personal data.

Public disclosure of the above-mentioned personal data, through the release of the documents (i.e. the cost statements) containing it, or through disclosure of a general description, would constitute processing (transfer) of personal data within the meaning of Article 3(3) of Regulation 2018/1725.

In its judgment in Case C-28/08 P (*Bavarian Lager*)³, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 (now replaced by, Regulation (EU) 2018/1725) becomes fully applicable.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if '[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests'.

2 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/EC, OJ L295, 21.11.2018, page 39.

3 Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59.

In your application you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, OLAF does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Only if conditions set out under Article 9(1)(b) of Regulation (EU) 2018/1725 are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary for a specific purpose in the public interest. If it is demonstrated to be necessary, it is then for the Institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject⁴. Where there is any reason to assume that the data subject's legitimate interests might be prejudiced, the controller of personal data then, establishes whether it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

Indeed, in the recent judgment in the *ClientEarth* case, the Court of Justice ruled that "*whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access*"⁵. We refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data⁶.

The EU Court has also confirmed that a mere *interest* of members of the public in obtaining certain personal data cannot be equated with a *necessity* to obtain the said data in the meaning of Regulation 45/2001⁷. Furthermore, according to the *Dennekamp* judgement, if the condition of necessity laid down by Article 8(b) of Regulation No 45/2001, which is to be interpreted strictly, is to be fulfilled, it must be established that the transfer of personal data is the most appropriate means for attaining the applicant's objective, and that it is proportionate to that objective⁸.

In any case, the travel costs of Commission staff members are regulated by Articles 11 - 13 of Annex VII to the Staff Regulations⁹ and are subject to the audit and control procedures. Furthermore, the officials of the Commission are not considered to be public office holders but exercise supportive functions allowing the Institutions to perform their mission. Nonetheless, OLAF publishes information on its activities on its website, including where appropriate about missions of its staff. We consider that through the above-mentioned initiative, the appropriate level of public transparency with regard to the travels of top officials is ensured.

4 Ibid.

5 Judgment of the Court of Justice of 16 July 2015 in case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

6 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 106.

7 Ibid, paragraphs 107 and 108.

8 Judgment of the General Court of 15 July 2015 in case T-115/13, *Dennekamp v European Parliament*, (ECLI:EU:T:2015:497), paragraph 77.

9 Staff Regulations of Officials and conditions of employment for other Servants of the EU.

In the light of the above, we have to conclude that the transfer of personal data through the public disclosure of the personal data included in the relevant costs statements cannot be considered as fulfilling the requirements of Regulation 2018/1725. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data included therein and it can be assumed that the legitimate rights of the data subjects concerned would be prejudiced by such disclosure.

1.2 Presumption of non-accessibility to OLAF investigation documents

The requested documents concern in part the investigation related travels. For this reason they additionally fall under exception from public access to documents 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 as well as the protection of the decision-making process as referred to Article 4(3) second sentence of the Regulation, unless there is an overriding public interest in disclosure.

The General Court recognised in recent case-law¹⁰ a general presumption of non-accessibility for documents in OLAF case files. It considers that the disclosure to the public under Regulation 1049/2001 of documents related to OLAF internal investigations could fundamentally undermine the objectives of the investigative activities, as well as the decision making process, both now and in the future.

The presumption is based on the consideration that, to determine the scope of 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 gathered¹¹, in the case at hand, Regulation 883/2013, which governs OLAF's administrative activity 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.

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: Article 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).

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 fulfil its mission of fight against fraud in the public interest. Some of the documents requested relate to the investigation activities aiming at gathering evidence and verifying allegations.

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

11 Judgment Court of Justice of 28 June 2012, *Agrofert Holding v Commission*, C-477/10 P, EU:C:2012:394, paragraphs 50-59; 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..

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. 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.¹² The specific confidentiality rules regarding the documents related to OLAF investigations are 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 investigation by OLAF, even after the conclusion of the investigation in question might, as explained above, seriously hamper the work of OLAF, disclose the methodology and 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 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 the individuals, so that the information they provide is used only for the purposes of the investigation. The protection of confidentiality extends to closed cases¹³.

2. 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.

No meaningful partial access to the cost statements concerned is possible, as the entirety of the information falling under the scope of your application and included therein is covered by the exception in Article 4(1)(b) of Regulation 1049/2001, and in part additionally fall entirely under the general presumption of applicability of Article 4(2), third indent and Article 4(3) of Regulation 1049/2001 in the context of inspections and audits.

3. Overriding public interest in disclosure

The exception laid down in Article 4(1)(b) of Regulation 1049/2001 is an absolute exception, i.e. its applicability does not need to be balanced against any possible 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, an application under Regulation (EC) No 1049/2001 would have to contain clear elements to indicate the existence of an overriding interest to justify putting internal OLAF documents and other information from the investigation file into the public domain.

12 See judgement in *Agrofert Holding v Commission*, cited above EU:C:2012:394, paragraph 66.

13 Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 164.

4. 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. We also wish to inform you that with regard to the repetitive request, the review is limited only to the assessment that the legal/factual circumstances have not relevantly changed since the previous reply.

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

Mr Ville ITÄLÄ
Director General OLAF
European Commission
B-1049 BRUXELLES
BELGIUM

Your attention is drawn to the statement concerning the transfer of personal data below.

Signed Electronically

Privacy statement

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.

All documentation 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 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-PROTxxxxxx@xx.xxropa.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.