

The Director-General

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Via e-mail

Brussels

Subject: Your confirmatory application for public access to documents

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Case No OF/2016/0462/A2 (Please include this number in all correspondence)

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Dear Ms BESWICK,

I refer to your confirmatory application made by e-mail dated 20/11/2020 and registered in OLAF on the same day under reference OCM(2020)32112. You requested the review of OLAF's position stated in its letter dated 21/10/2020 and registered under reference OCM(2020)28523, concerning your request for public access to documents under Regulation (EC) No 1049/2001<sup>1</sup>.

Your confirmatory application for public access to documents was carefully considered and a detailed response follows.

#### 1. Your initial and confirmatory applications

On 10/09/2020, you submitted an initial application for public access to documents under Regulation (EC) No 1049/2001, in which you have requested public access to the following documents:

*"documents which contain the following information:*

*What NGO is being referred to on page 14/15 of the OLAF Report 2019 (<https://ec.europa.eu/anti-fraud/sites/an...>) in the section SIPHONING OFF MONEY FROM SYRIA?*

*OLAF describes a "high-profile case" concerning "a well-known non-governmental organisation (NGO) involved in supporting EU humanitarian aid efforts in Syria" where "investigators found evidence of corruption by two former staff members of the NGO". "*

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<sup>1</sup> OJ L 145, 31.05.2001, page 43.

In its reply dated 21/10/2020, OLAF refused public access to the documents containing the information you had requested. OLAF explained that those documents related to an investigation carried out by OLAF and are, therefore, covered by a general presumption of non-disclosure recognised by settled EU case-law<sup>2</sup>, according to which the disclosure to the public under Regulation (EC) 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.

In your confirmatory application, you reiterate your request for access to the same documents. In that regard, you specify that you are "*solely requesting the name of the NGO that is being referred to on page 14 of this report ("a well-known non-governmental organisation (NGO) involved in supporting EU humanitarian aid efforts in Syria"), not the names of sources, witnesses or other persons concerned*", and you state that "*this mitigates the risk of potential harm to the people involved in the investigation*".

In addition, you put forward the following arguments in support to your request:

*"I believe there is a strong public interest in disclosing this information that outweighs the reasons you put forward in your response. This goes beyond the general public interest in transparency, in an era where trust is paramount.*

*I appreciate that the publication of the sensitive information contained in the OLAF case file might harm the protection of personal data and/or the integrity of persons involved in the investigation but in this case, I believe the public interest outweighs this risk of harm, which is either non-existent or very low for the aforementioned reason. These are the reasons it is in the public interest to disclose the requested information:*

*1) As well as receiving finance from the EU, this NGO will be funded by donations from the public and those who donate to the organisation have the right to know so that they can make an informed decision about to whom they give their hard-earned money.*

*2) If such information were withheld from the public, this could lead to mistrust in NGOs in general and negatively impact those that were not implicated in corruption concerning aid in Syria, harming their chances of raising much-needed funds. This, in turn, could mean less funding to help those who are in desperate need of it in Syria - an extremely vulnerable group in the general public."*

## 2. Preliminary remarks

The purpose of Regulation (EC) No 1049/2001 is to give access to documents held by EU institutions 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, documents disclosed under this Regulation are to be considered publicly available.

In this context, OLAF would like to recall that the EU legislator has provided for the confidentiality of information collected by OLAF in the framework of its investigations. The obligation to treat all information obtained during its investigation as confidential and subject to professional secrecy stems, in particular, from Article 339 of the Treaty on the functioning of the European Union, Article 10 of Regulation (EU, Euratom) No 883/2013<sup>3</sup> and Article 17 of the Staff Regulations.

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<sup>2</sup> See judgments of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 162 and Judgment of the General Court of 26 May 2016, *IMG v Commission*, T-110/15, ECLI:EU:T:2016:322, paragraph 36.

<sup>3</sup> OJ L 248, 18.9.2013, p. 1, as amended OJ L 317, 23.11.2016, p. 1.

### 3. Assessment of the documents under Regulation (EC) 1049/2001 - relevant applicable exceptions – presumption of non-accessibility

Having carefully considered your confirmatory application, OLAF regrets to inform you that your application cannot be granted, based on the following considerations.

As already explained in reply to your initial application, the documents which you seek to obtain are part of the investigation file no OF/2016/0462/A2. Therefore, they are covered by the exceptions under Article 4(2) first and third indent and Article 4(3) second paragraph of Regulation (EC) No 1049/2001, which stipulate that the institutions shall refuse access to a document where disclosure would undermine the protection of the commercial interests of a natural or legal person or the purpose of inspections, investigations and audits, or would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. These exceptions are applicable to the documents in their entirety, including also to those parts containing information about the identity of the legal person, which is a person concerned in OLAF's investigation. Finally, the documents which you seek to obtain are also covered by the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and integrity of the individual).

#### ***3.1 Protection of the purpose of inspections, investigations and of the decision-making process***

The General Court has recognised a general presumption of non-accessibility for all documents in OLAF case files<sup>4</sup>. The Court considers that the disclosure to the public under Regulation (EC) No 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.

That presumption is based on the consideration that, to determine the application of 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>5</sup>.

Regulation (EU, Euratom) No 883/2013, which governs OLAF's administrative activity provides for the obligation of confidentiality with regard to all information gathered during investigations. The following provisions of that Regulation regulate and restrict the use of information in OLAF investigation files, before, during and after an OLAF investigation: Article 4 (internal investigations); Article 5 (opening of investigations); Article 6 (access to information in database prior to the opening of an investigation); Article 7 (investigations procedure); Article 8 (Duty to inform OLAF); Article 9 (procedural guarantees); Article 10 (confidentiality and data protection); Article 11 (investigation report and action to be taken following investigations); Article 12 (Exchange of information between OLAF and the competent authorities of Member States); Article 13 (cooperation between OLAF and Eurojust and Europol); Article 14 (cooperation with third countries and international organisations); Article 15 (Supervisory Committee), Article 16 (exchange of views with the institutions), and Article 17 (Director-General).

In view of that regulatory context, the Court held that allowing public access to any part of OLAF investigation documents would be particularly detrimental to OLAF's ability to fulfil its mission of fight against fraud in the public interest because they directly relate to the investigation activities aiming at gathering evidence and verifying allegations. The disclosure of these documents would seriously affect the decision-making process of OLAF,

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<sup>4</sup> See judgments in *Strack v Commission*, T-221/08, cited above, paragraphs 150 to 162 and *IMG v Commission*, T-110/15, cited above, paragraph 36.

<sup>5</sup> 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.; judgment in *IMG v Commission*, T-110/15, cited above, paragraphs 29-34.

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<sup>6</sup>.

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 (e.g. persons concerned, witnesses, informants), so that the information they provide is used only for the purposes of the investigation. The protection of confidentiality extends to closed cases<sup>7</sup>.

In this case, the documents containing the requested information are part of an OLAF investigation file and are thus covered by the above-mentioned general presumption of confidentiality. Even if OLAF's investigation has been closed with a recommendation to the European Commission, to recover the EU funds unduly paid to the NGO in question, the recovery procedure is ongoing and OLAF is still monitoring the follow-up activities triggered by its recommendation.

Having regard to the above, I consider that the use of the exceptions under Article 4(2), third indent (protection of the purpose of investigations) and Article 4(3) second paragraph (protection of the decision-making process) of Regulation (EC) No 1049/2001 is justified, and that access to the documents in question must be refused on that basis.

### *3.2. Protection of commercial interests*

In addition, according to EU case law, documents linked to an OLAF investigation, including the identity of the persons concerned by that investigation, enjoy the protection of confidentiality and are covered by the exception of the protection of commercial interests, as OLAF collects, in the context of its investigations, sensitive company secrets and highly sensitive information on (legal) persons concerned, whose disclosure could seriously damage their reputation<sup>8</sup>.

In this case, the documents in OLAF's case file, in particular the final report and recommendation, refer to the investigation carried out by OLAF, and to allegations of misuse of EU funds by the NGO, which was a person concerned in the investigation. They also refer to the public procurement procedures in which the NGO was involved, to the contracts awarded and to how they were implemented. Disclosing this sensitive and confidential information, including the name of the legal person that was a person concerned in the investigation, could have a negative effect on the image of that legal person, and could create possible misrepresentations about it. Therefore, disclosing its identity would damage its reputation and would undermine the protection of its commercial interests. Public disclosure of this information would indeed deprive it of its ability to exercise its activities effectively. OLAF cannot elaborate any further on the underlying justification without

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<sup>6</sup> See judgement in *Agrofert Holding v Commission*, C-477/10 P, cited above, paragraph 66.

<sup>7</sup> *Strack v Commission*, T-221/08, cited above, paragraphs 150 to 164.

<sup>8</sup> See, in that regard, judgment in *Strack v Commission*, T-221/08, cited above, paragraphs 207 to 211.

revealing the contents of the sensitive information contained in the documents in its investigation file and without thereby depriving the applicable exception for the protection of commercial interests of its very purpose.

Having regard to the above, I consider that the use of the exception under Article 4(2), first indent of Regulation (EC) No 1049/2001 (protection of commercial interests) is justified, and that access to the documents in question, including the identity of the legal person concerned in OLAF's investigation, must be refused on that basis.

### *3.3 Protection of privacy and the integrity of the individual*

Finally, 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 file 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.

The documents contain the names of the NGO's staff and information that refers to the identification of these persons. They also contain names of OLAF staff. This information cannot be released to the public at large, on the basis of the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001. This article provides that '*[t]he 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*'.

In its judgment in Case C-28/08 P (Bavarian Lager)<sup>9</sup>, 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<sup>10</sup>) 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*'.

In your confirmatory application, you specify that you are solely requesting the name of the NGO referred to in OLAF Report 2019, and not the names of sources, witnesses or other persons concerned. Therefore, OLAF does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified.

Having regard to all the above, the documents requested are exempt, in principle and in full, from disclosure to the public unless you demonstrate that the general presumption of confidentiality is not applicable because an overriding public interest justifies the disclosure of the requested documents. This aspect will be dealt with under point 5 below.

## 4. Partial Access

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<sup>9</sup> Judgment of the Court of Justice of 29 June 2010, *Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59.

<sup>10</sup> OJ L 295, 21.11.2018, p. 39–98.

As regards partial access, the general presumption referred to above indicates that the documents covered by it do not fall within an obligation of disclosure, in full or in part, of their content<sup>11</sup>. There is therefore no need for OLAF to examine the possibility of granting partial access to the requested documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

In any event, partial access is not possible, given that the information the documents contain falls entirely under the general presumption of applicability of Article 4(2) third indent (protection of the purpose of inspections, investigations and audits) and of Article 4(3) second sentence (protection of the decision-making process) of Regulation (EC) 1049/2001.

## 5. Overriding public interest in disclosure

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) 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. It is for the applicant to show that there is an overriding public interest in disclosure<sup>12</sup>.

In addition, general considerations such as the principle of transparency and its importance cannot provide an appropriate basis for establishing that the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question<sup>13</sup>.

Moreover, the public interest in accessing a document based on the principle of transparency is not as relevant for an administrative document (such as documents related to a specific investigation) as for a document where the EU institution acts as legislator. 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>14</sup>.

It is in the light of the above considerations that your arguments claiming that there is an overriding public interest in disclosing the requested documents must be examined.

In your confirmatory application, you consider that such overriding public interest in disclosure exists, given that the NGO in question is funded by donations from the public. Therefore, the donors have, in your view, the right to know the name of the NGO so that they can make an informed decision about to whom they give their money. In addition, you argue that withholding this information from the public could lead to mistrust in NGOs in general and negatively affect those that were not implicated in corruption concerning aid in Syria, harming their chances of raising funds. This, in turn, could mean less funding to help those who are in need of it in Syria, that is, an extremely vulnerable group in the public.

OLAF understands your arguments as referring to the general principle of transparency of EU institutions. While the situation in Syria is certainly difficult for the vulnerable people that need help, OLAF wishes to reiterate that public disclosure of OLAF's investigation documents might create serious misconceptions on the part of the public. Apart from causing harm to OLAF's investigative function, it could also undermine the protection of legitimate interests of persons concerned, witnesses and staff of the Office.

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<sup>11</sup> Judgment of the Court of Justice of 28 June 2012, *Commission v Odile Jacob*, Case C-404/10 P, EU:C:2012:393, paragraph 133.

<sup>12</sup> Judgement of the Court of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 128, with further reference, and paragraphs 129 and 131; judgment of the General Court of 15 September 2016, *Herbert Smith Freehills v Council*, T-755/14, EU:T:2016:482, paragraph 74, with further references; see also the references quoted in judgment of the General Court of 13 November 2015, *ClientEarth v Commission*, Joined Cases T-424/14 and T-425/14, EU:T:2015:848, paragraph 137.

<sup>13</sup> *Strack v Commission*, case T-221/08, cited above, paragraph 167.

<sup>14</sup> Judgement of the Court of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 91.

Against this background, OLAF considers that the confidentiality of its investigations, as provided for in Regulation (EU, Euratom) No 883/2013, protects the fundamental rights of the persons under investigation. In other words, the public interest in disclosure must be balanced against fundamental principles of the EU legal order, such as the presumption of innocence.

In addition, in cases such as this one, the rules that govern the disclosure to the public of documents held by the EU institutions recognize that, at times, the public interest is best served by not releasing documents, if doing so would damage an OLAF investigation, or any follow-up measures that are being considered based on it, also intended to protect the public interest.

In that regard, it is also important to note that, according to established EU case law, OLAF's reports and recommendations drawn up following an external or internal investigation and sent to the competent follow-up authorities are only recommendations or opinions which have no binding legal effects<sup>15</sup>. It follows from the provisions of Regulation (EU, Euratom) No 883/2013, and particularly from recital 31 and Article 11 of that regulation, that OLAF's conclusions contained in a final report cannot lead automatically to the initiation of judicial or disciplinary proceedings, since the competent authorities, to which the report of the external or internal investigation is sent, are free to decide what action should be taken on the final report and are accordingly the only authorities having the power to adopt decisions capable of affecting the legal position of those persons in relation to which the report recommended that such proceedings be instigated<sup>16</sup>. A report drawn up by OLAF following its internal and external investigations does not significantly change the legal situation of the persons named in that report, any more than the forwarding of information to the national authorities or to the EU authorities.

The EU case law also indicates that the competent follow-up authorities need a reasonable period to consider their actions. It is therefore important, for the public, that the ability to properly carry out recovery proceedings following an OLAF investigation, aimed at ensuring that EU funds unduly spent are recovered to the EU budget, is not undermined. The completion of such proceedings is essential in terms of protecting EU public funds.

This appears to be the situation in this case. As you know, OLAF's investigation was concluded at the end of 2019 with a recommendation to recover nearly €1.5 million. Therefore, while there might be a public interest in citizens being informed about NGOs that receive public funds, such as the NGO in question in this case, this interest needs to be balanced with the risk of undermining OLAF's investigative function or the proper conduct of the recovery proceedings.

Based on the above-mentioned arguments, while OLAF understands the importance of transparency of the functioning of the EU institutions, it considers that, given the nature of its anti-fraud investigations, and the confidential nature of information collected, that existence of an overriding public interest in disclosing the requested document has not been demonstrated to the required legal standard. The arguments that you raise cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying that the confidentiality of the documents be maintained. Nor have I, based on the information at my disposal, been able to identify any element capable of demonstrating the existence of an overriding public interest.

I therefore conclude that, in the present circumstances, although there might be an interest for the public to be informed about NGOs funded by donations from the public, there is no overriding public interest, which justifies disclosure.

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<sup>15</sup> See orders of 13 July 2004, *Comunidad Autónoma de Andalucía v Commission*, T-29/03, EU:T:2004:235, paragraph 33, and of 21 June 2017, *Inox Mare v Commission*, T-289/16, EU:T:2017:414, paragraph 14.

<sup>16</sup> See orders of 13 July 2004, *Comunidad Autónoma de Andalucía v Commission*, cited above, paragraph 37; of 21 June 2017, *Inox Mare v Commission*, cited above, paragraph 22; and of 22 January 2018, *Ostvesta v Commission*, T-175/17, EU:T:2018:49, paragraph 29 and the case-law cited.

Finally, insofar as the requested documents involve the protection of privacy and integrity of individuals (Article 4(1)(b) of Regulation (EC) No 1049/2001), overriding public interest in disclosure is not applicable.

#### 6. Means of redress

I draw your attention to the possible means of redress available against this decision. You may either bring proceedings before the Court of Justice of the European Union or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Signed Electronically

#### Privacy notice

Pursuant to Articles 15 and 16 of Regulation No 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 or in relation to the activities carried out in order to fulfil OLAF's tasks referred to in Article 2 of Decision 1999/352/EC, ECSC, Euratom and Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). The categories of your personal data being processed are contact data, identification data, professional data, and case involvement data. Your data may originate from various sources, including publicly accessible information. Your data may be transferred to other EU institutions, bodies, offices and agencies, competent Member State and third country authorities and international organisations. There is no automated decision process by OLAF concerning any data subject. Your data will be stored for a maximum of 15 years.

You have the right to request access to, rectification or erasure, or restriction of processing of your personal data and to object to their processing on grounds relating to your particular situation. If you wish to request access to your personal data processed in a specific file, please provide the relevant reference or description in your request. Any such request should be addressed to the Controller ([OLAF-FMB-Data-Protection@ec.europa.eu](mailto:OLAF-FMB-Data-Protection@ec.europa.eu)).

The complete privacy statement 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). If you have questions as regards the processing of your personal data or your rights you may contact the OLAF Data Protection Officer ([OLAF-FMB-DPO@ec.europa.eu](mailto:OLAF-FMB-DPO@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](mailto:edps@edps.europa.eu)) at any time.