Subject: Request for access to documents
Ref.: Your request of 20 February 2023 registered under reference 2023/1123.

Dear Mr. Dohle,

I refer to your application above-mentioned by which you request, under Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, a copy of “all documents related to the Case T-658/17, Stichting Against Child Trafficking v European Commission [...] all public, all formal case-related documents, and all internal/external documents/communication on this case”.

Kindly note that your application has been split into two parts between the Legal Service (2023/1123) and OLAF (2023/1979). The present reply addresses the part under the responsibility of and held by the Legal Service.

1. IDENTIFICATION OF THE DOCUMENTS

In response to your request, the Legal Service has identified the following documents matching the terms of your request:

1. Exchange of emails from 2 to 8 February 2018 between the Legal Service and OLAF [document reference Ares(2018)833874];
   1.1. Annex to the exchange of emails;
2. Applicant’s request for annulment;
3. Question from the Court to the Applicant;
4. Applicant’s reply to the question of the Court;
5. Commission’s objection of inadmissibility;
6. Applicant’s comments on objection of inadmissibility.

2. **ASSESSMENT OF THE DOCUMENTS**

Having carefully examined the concerned documents, I have come to the conclusion that:

a) Access can be granted to documents 3, 4 and 6, with the exception of some personal data contained in documents 4 and 6, in accordance with Article 4 (l)(b) of Regulation (EC) No 1049/2001;

b) Partial access can be granted to those parts of documents 2 and 5 that are not covered by any of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001;

c) Documents 1 and 1.1 must be refused in full.

The refused documents are an email exchange between the Legal Service and OLAF discussing the admissibility of the case T-658/17 which is challenging the decision not to open an investigation, with its annex containing a note prepared by the selector in charge in relation to the selection case in question.

The refused parts of documents 2 and 5, which are documents submitted by the Applicant and the Commission in case T-658/17, contain commercial information on NGOs, the Italian adoption agency as well as on documentaries. Moreover, they contain information related to OLAF’s course of investigation and thus reflect its strategy and methods.

3. **REASONS FOR REFUSAL**

3.1 **Protection of legal advice**

Article 4(2), second indent, of Regulation (EC) No 1049/2001 states by way of exception that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: […] – legal advice […]", unless there is an overriding public interest in disclosure".

I consider that disclosure of document 1 would undermine the protection of legal advice, which, as recognised by the Court of Justice, represents an exception that must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. Disclosure would make known to the public sensitive internal opinions, drafted under the responsibility of the Legal Service and intended for OLAF dealing with the approach to be taken by the Commission in case T-658/17 which is challenging OLAF’s decision not to open an investigation.

Indeed, document 1 reveals discussions between the Legal Service and OLAF on the preparation of the court case T-658/17 and in particular on the preliminary approach advised to be taken in that case by the Legal Service (discussed with OLAF, the e-mails originating from which, if disclosed, would also reveal the content of the Legal Service’s advice). It must therefore remain confidential in its entirety.

Disclosing the internal legal assessment contained in the document 1 would clearly have, in a foreseeable manner, a serious impact on the Commission's interest in seeking and receiving legal advice and on the Legal Service's capacity to assist the Commission and its services, in this case OLAF, in the assessment of legal strategy. The frankness, objectivity and comprehensiveness of the legal advice would be seriously affected if legal advice on

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such highly sensitive subjects, as in the present case, would be disclosed, depriving thus the Commission of an essential element in the framework of its work.

In the light of the foregoing, I consider that the document 1 is covered by the exception provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001 (“protection of legal advice”) and cannot be made public.

3.2 Protection of the purpose of investigations and of the decision-making process

Document 1.1 and some parts of documents 2 and 5 are covered by the exceptions provided for in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 (“protection of the purpose of inspections, investigations and audits”) and the second subparagraph of Article 4(3) of that Regulation which states by way of exception that “[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.”.

In fact, parts of documents 2 and 5 contain exchanges providing an account of the information transmitted to OLAF or obtained by OLAF in the course of its investigation. As such, they reflect the Office’s strategy and methods.

Document 1.1 describes all information submitted by the applicant to OLAF, as well as information collected and consulted by OLAF in the framework of selection case and the reasons of insufficient suspicion to justify the opening of an investigation.

The (full) disclosure of these documents would thus seriously undermine the institution’s decision-making process and the effectiveness of future OLAF investigations.

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 883/2013 and Article 17 of the Staff Regulations.

The General Court recognises a general presumption of non-accessibility under which the disclosure to the public under Regulation (EC) No 1049/2001 of documents related to OLAF investigations could fundamentally undermine the objectives of investigative activities, as well as the decision making process, both now and in the future.

The documents in OLAF’s case files fall under a general presumption of non-accessibility as they contain information collected during an OLAF investigation and are subject to professional secrecy, regardless of whether the request for access to documents concerns an ongoing or a closed investigation. The case at stake was dismissed at the selection phase, which is an intrinsic part of the investigation process. The protection of confidentiality extends to this phase in the same way it applies to the investigation strictly speaking and follow-up phase. Therefore, the above considerations are also applicable to

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5 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ P 045 14.6.1962, p. 1385), as amended.

selection cases, such as the one at hand. This document is consequently exempt, in principle and in full, from disclosure to the public.

In addition, as stated by the General Court in its judgment in case T-18/15, the disclosure of that kind of information would seriously undermine the decision-making process, since it would prevent from making such remarks independently and without being unduly influenced by the prospect of wide disclosure. Therefore, the possibility of expressing views internally in an independent manner is likely to provoke internal reactions that contribute to the smooth running of the decision-making process.7

Disclosure would also run the risk of discouraging potential witnesses and informants to cooperate with OLAF. Such persons must be reassured that their statements and the information they provide to OLAF will be kept confidential, otherwise they might be inclined to censor the information they give or to hold back sensitive information8. As a result, OLAF’s internal decision-making process with regard to other investigations could be seriously affected and OLAF’s effectiveness undermined.

Thus, although the General Court has rendered its order in case T-658/17, document 1.1 as well as the expunged information contained in documents 2 and 5 must be protected under the exceptions relating to the protection of the purpose of investigations and decision-making process and cannot be disclosed.

3.3 Protection of the commercial interests

Article 4(2), first indent of Regulation (EC) No 1049/2001 states by way of exception that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure”.

The purpose of this exception is to protect the commercial and business interests of natural or legal persons, especially with respect to confidential information related to their economic activities.

On this basis, the name of the Italian adoption agency and other information allowing its identification, including names, links and content of some documentaries, mentioned in documents 2 and 5, are expunged, as is information related to another NGO in document 2.

In fact, considering that the General Court abstained from revealing these pieces of information in its ruling, I consider that it constitutes sensitive information, known to a limited number of persons, the disclosure of which may have a prejudicial effect on the commercial interests of the company concerned. This risk is reasonably predictable and not purely hypothetical.

Consequently, the information withheld must be covered by that exception and cannot be disclosed.

4. Protection of personal data

As stated above, some personal data have been redacted in the documents disclosed since they are covered by the exception provided for in Article 4 (l)(b) of Regulation (EC) No 1049/2001, in accordance with the European Union legislation regarding the protection of personal data.

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8 Judgment of the General Court in case T-221/08, Strack v Commission, cited above, paragraph 153.
The redacted information consists of:

- the handwritten signature, contact details and financial identification details of the lawyer representing the Applicant (documents 2, 4 and 6);
- the title, place of work and part of the first name of the lawyer representing the Applicant not indicated in the ruling (documents 2, 4, 5 and 6);
- the name of the director of the organisation being the Applicant (document 2);
- the name of the former Commission official and other personal data of that person, including gender pronouns (document 2);
- the name and handwritten signature of the Court’s official (document 4);
- the initials and parts of the first names of Commission’s officials not indicated in the ruling (document 5).

In the present case, it has not been established that it is necessary to have these data transmitted for any specific purpose in the public interest (Article 9(1)(b) of the Data Protection Regulation, i.e. Regulation (EU) No 2018/1725). Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure could result in identifying the data subjects and consequently would harm their privacy and subject them to unsolicited external contacts.

5. POSSIBILITY OF GRANTING PARTIAL OR WIDER ACCESS

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial or wider access to the documents requested. However, after careful examination, I have come to the conclusion that they are entirely covered by the exceptions invoked so that a partial or a wider disclosure cannot be granted without harming the protected interests.

6. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) and (3) of that Regulation, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case, it must outweigh the interests protected under Article 4(2), second and third indent, and Article (3), first subparagraph, of Regulation (EC) No 1049/2001.

In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of documents requested that would outweigh the public interest in the protection of the legal advice, of the purpose of investigations, the institution’s decision-making process as well as the commercial interests of the companies concerned.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

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7. **Means of redress**

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Secretariat-General of the Commission at the following address:

European Commission  
Secretariat-General  
BERL 7/076  
B-1049 Brussels  
or by e-mail to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[signed electronically]  
Clemens Ladenburger  
p.p. Daniel CALLEJA

**Attachments:** 5